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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 UNITED STATES OF AMERICA,

5 v.

15 Cr. 317 (KMW)

6 DEAN SKELOS and ADAM SKELOS,

7 Defendants.

Trial

8 -----x

New York, N.Y.

July 5, 2018

9:15 a.m.

9 Before:

10 HON. KIMBA M. WOOD,

11 District Judge

12 APPEARANCES

13 ROBERT S. KHUZAMI

14 Acting United States Attorney for the  
15 Southern District of New York

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22 JOHN J. KENNEY

23 ALLISON N. ANGEL

JULIAN S. BROD

24 Also Present: Yolanda Bustillo, Paralegal Specialist  
25 Special Agent Tracee Mergen, FBI  
Jessica Kaplove, Paralegal

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(Jury not present)

THE COURT: Do counsel wish to raise anything right now?

MR. GAGE: One very brief issue, your Honor.

THE COURT: Yes.

MR. GAGE: At the end of Mr. Barrella's direct the last time, who I understand to be the next witness, two questions were asked which implied that Mr. Skelos had a duty to make disclosures to Mr. Barrella about conversations he had had with Adam. And I am hoping and assuming those questions aren't going to be asked this time because there is no duty to talk to a lobbyist. We had a discussion about that issue with regard to others, but if those questions are going to be asked, I just want to note we object. I don't want to have to stand up in front of the jury and raise an objection, but we would like an objection to any question which even remotely implies that Dean Skelos had a duty to disclose conversations with his son to Mr. Barrella.

MR. DISKANT: Your Honor, I don't plan to say anything about a duty to disclose. I certainly do plan to elicit from the witness that notwithstanding the fact that he was representing PRI and had many conversations with Senator Skelos about PRI, Senator Skelos at no point told him that PRI was employing his son. The ruling that the Court has given us on this issue I will adhere to.

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1 MR. GAGE: Your Honor, the difficulty I have with  
2 that -- the objection I have to that is it really does imply  
3 that there is some duty or omission and that there is something  
4 improper about that, and that's the basis for our objection.

5 I don't see that the government needs that. They can  
6 ask, to the extent appropriate, we're not waiving our right to  
7 object to other questions, but: What did Senator Skelos say to  
8 you and what did you say to him? That should be sufficient for  
9 this witness.

10 MR. DISKANT: Your Honor, I think the problem with the  
11 what-did-you-say-to-him-and-what-did-he-say-to-you question,  
12 which in the ordinary course I do use, is that it doesn't get  
13 to an omission, but if nothing was said about the subject,  
14 there is no way of eliciting the fact that nothing was said  
15 about the subject without asking: What, if anything, was said  
16 about the subject?

17 MR. GAGE: That is precisely my point, your Honor.  
18 When you ask about an omission, you are implying that there was  
19 something wrongful about that omission, and that is the basis  
20 of our objection. Again, there is absolutely no duty for Dean  
21 Skelos to disclose everything he discussed with his son to a  
22 lobbyist.

23 MR. DISKANT: I am happy to continue on this, your  
24 Honor.

25 THE COURT: Go ahead.

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1 MR. DISKANT: I think you ruled on it many, many times  
2 at this point. I'm prepared to ask the questions your Honor  
3 permitted us to.

4 THE COURT: In connection with a public official's  
5 duty of honest and faithful service to the public, if that  
6 official has obtained a corrupt payment for himself or for  
7 another person in exchange for official action taken or to be  
8 taken, he has breached his duty of honest, faithful and  
9 disinterested service. That's what I held.

10 MR. GAGE: And we respectfully object, because there's  
11 no deputy to disclose to Mr. Barrella.

12 THE COURT: I hear you.

13 MR. KENNEY: If I may, your Honor, I have a small  
14 point. I have a 3 o'clock before Judge Sweet, which is a bail  
15 hearing in a CJA case, which shouldn't take more than probably  
16 20 minutes. But I would be happy to -- I wouldn't want to  
17 interrupt wherever we are, perhaps during the charge  
18 conference, so could I be excused and have Julian Brod present  
19 for that purpose while I'm gone?

20 THE COURT: Certainly.

21 MR. KENNEY: Thank you.

22 THE COURT: Ms. Shapiro.

23 MS. SHAPIRO: Ms. Angel put in a letter objecting to  
24 the chart that I think is going to come in on the second  
25 witness this morning, so I just wanted to make sure the Court

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1 ruled on it.

2 THE COURT: Okay. I believe that the jury can see the  
3 chart that I have seen and can take it with them into the jury  
4 room. It would not be admitted as evidence. It's being  
5 admitted as a pedagogical device that is useful to the jury in  
6 accord with the Second Circuit decision in *Casamento*,  
7 C-A-S-A-M-E-N-T-O.

8 MS. ANGEL: Your Honor, may we be heard on this?

9 THE COURT: Yes, you may. Let me tell you what my  
10 tentative ruling is and then you can speak to that.

11 MS. ANGEL: Apologies. I thought you were done.

12 THE COURT: No, you're quite right.

13 The charts will not be deemed evidence. The jury will  
14 be told they're free to disregard the charts if they wish.  
15 They will be told that they summarize portions of the evidence  
16 chosen by counsel, and that the best evidence is still the  
17 originals that have been entered into evidence.

18 I would be allowing the charts in under Rule 611(a)  
19 with respect to controlling the presentation of evidence to  
20 make the presentation effective for determining the truth and  
21 to avoid wasting time.

22 Go ahead, Ms. Angel.

23 MS. ANGEL: Your Honor, demonstrative aids and  
24 pedagogical devices aren't supposed to go into the jury room  
25 with the jury. They can be shown on summation as aids or with

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1 the witness, but they shouldn't go into there to guide their  
2 deliberations.

3 THE COURT: What is your view of *Casamento*?

4 MS. ANGEL: Your Honor, I don't think the chart in  
5 *Casamento* was remotely as argumentative as the chart that we  
6 have been discussing.

7 THE COURT: Have you seen it?

8 MS. ANGEL: No, I read the case.

9 THE COURT: I read the case, too, which says that the  
10 charts, through graphs, maps or brief written descriptions,  
11 summarized the evidence that the government had presented, much  
12 consisted of the testimony of the government agents regarding  
13 observations made occurring surveillance, transcripts of  
14 intercepted telephone conversations, and seized items.

15 MS. ANGEL: Your Honor, transcripts of intercepted  
16 calls are not the same as indicating calls that had taken place  
17 when there was not a wiretap, and it requires and in fact  
18 invites speculation and inference regarding the substance of  
19 those calls, which inviting inference and speculation in a  
20 chart is argumentative in and of itself. The majority of the  
21 calls in the chart were not -- did not take place when the  
22 wiretap was up. So just to be blunt, no one knows what was  
23 actually spoken about on those calls. So just listing the fact  
24 that there's a large volume of calls around the dates and  
25 events that the government seeks to highlight invites inference

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1 that these calls were all about the various events that they  
2 want to draw attention to.

3 But as I pointed out in our letter, the defendants  
4 spoke that frequently on -- routinely throughout the various  
5 years from 2010 to 2015, but that's also not indicated in the  
6 charts, so it looks like all they do is speak in and around the  
7 events that the government seeks to highlight. And the only  
8 way to correct that would be for us to introduce a dueling  
9 chart, at which point that's just misleading and confusing to  
10 the jury and undermines the purpose of a pedagogical device,  
11 and it does shift the burden to the defense to prove this case.

12 MR. McKAY: Your Honor, just briefly, if I may, I  
13 think all the points that Ms. Angel just made can very  
14 adequately be made on cross-examination, and I'm sure they  
15 will. They are entitled to put on their own charts. That's  
16 not burden shifting, they just have an option; if they want  
17 present a different narrative, they are certainly welcome to.

18 The other case I point your Honor to is *United States*  
19 *v. Pinto*, 850 F.2d 927. And I think this is important because  
20 this discusses both the issue of whether they're admissible  
21 summary charts but also whether they can go back to the jury.  
22 And I think what the Court is ruling here, if I understand the  
23 Court correctly, is that the charts are not themselves  
24 evidence. The jury will be instructed that the evidence is the  
25 underlying exhibits, and they are to consider whether they

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1 think the charts fairly and accurately summarize that  
2 underlying evidence. They're allowed to go back to the jury  
3 for that purpose, as the court said in *Pinto*, however, with the  
4 instruction that we have proposed, which the Court has in its  
5 draft instruction.

6 THE COURT: Yes.

7 MS. ANGEL: Your Honor, in reality, each of the  
8 various phone records that they cite to are -- I don't want to  
9 say each of them, but they're hundreds of pages. The first  
10 one, 101 I believe, is over 500 pages. The jury, just because  
11 they have that in there, if they have a 17-page chart telling  
12 them what they need to look at, they're not likely to take out  
13 the 500-page record and GO back and verify the accuracy and/or  
14 look at how frequently other calls were made when it requires  
15 matching up whose number went to who and on what dates and for  
16 how long. And that's the case for every one of the phone  
17 records, which off the top of my head I'm not remembering the  
18 number, but there are eight different phone records that are at  
19 least hundreds of pages each.

20 THE COURT: That argument supports equally the  
21 government's position.

22 MS. ANGEL: I do understand that it is a summary  
23 chart, your Honor, and that's the point of it, but the way that  
24 it's presented is argumentative, and the fact that the  
25 underlying evidence is in there with them does nothing to cure



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1 that because realistically the jury is not going to look at it.

2 THE COURT: I rule that the chart is admissible under  
3 611(a) for the reasons I stated this morning. When I say  
4 "admissible," I do not mean as evidence, I mean it can be given  
5 an identifying number or set of letters, can be used during  
6 summation and can go to the jury.

7 Any other points anyone would like to raise?

8 MR. McKAY: Has the Court decided on whether or not we  
9 can admit what has been called the Greek diner call?

10 THE COURT: Yes.

11 MR. McKAY: Yes, you decided?

12 THE COURT: I have decided but I haven't put it on the  
13 record.

14 MR. McKAY: Will you let us know, your Honor?

15 THE COURT: Yes, I will, just a second.

16 The probative value of the Greek diner call is that it  
17 refers to Adam Skelos' quote "reach" and his refusal to discuss  
18 what benefits he could arrange for the diner owner -- and other  
19 diner owners, I note -- strongly suggesting that it is an act  
20 in furtherance of the conspiracy and probative of Adam Skelos'  
21 awareness that what he was offering was not an innocent act.  
22 Thus, 404(b) allows its admission. It essentially furthers the  
23 conspiracy to monetize Dean Skelos' position for Adam Skelos'  
24 financial benefit, notwithstanding that it did not succeed, and  
25 hence, it is not an "other" act within the meaning of Rule

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1 404(b) .

2 Evidence that Adam Skelos did not want to discuss on  
3 the telephone how he could use his "reach" to benefit the Greek  
4 diner owner, who was a representative of an association of  
5 4,000 Greek diner owners, shows Adam Skelos' awareness that  
6 this type of act is not innocent. The Second Circuit has  
7 adopted an "inclusionary" approach to other act evidence under  
8 Rule 404(b). Thus, I find that it is offered for a proper  
9 purpose, it's relevant to a material act in dispute, and its  
10 probative value is not substantially outweighed by the danger  
11 of unfair prejudice.

12 The prejudice that defendants claim is that Adam  
13 Skelos' aggressive tone and harsh language and dismissive  
14 treatment of the diner owner paints Adam Skelos in a bad light  
15 and is likely to cause the jury to dislike him. In my view,  
16 the defendant's own words and tone are probative rather than  
17 prejudicial. To the extent that there is any prejudice against  
18 Adam Skelos that would flow from admission of this call, I find  
19 that it is heavily outweighed by the probative value of the  
20 call.

21 MR. BROD: Thank you, your Honor, we just ask that our  
22 objection be noted for the record.

23 THE COURT: It is.

24 MS. SHAPIRO: Your Honor, could we get a limiting  
25 instruction to the effect that the call is only against Adam

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1 Skelos and not Dean Skelos?

2 MR. McKAY: I think you just ruled that it's an act in  
3 furtherance of the conspiracy, and they're co-conspirators.

4 THE COURT: I did.

5 I note your objection.

6 MR. McKAY: Your Honor, we have one scheduling matter  
7 to take up, but if the jury is ready, we could do it later.

8 THE COURT: The jury is here.

9 MR. McKAY: So then we'll talk about this at the  
10 break.

11 THE COURT: Okay. I'm reading a note from Christine  
12 Pena, the juror who wants to be able to drive her partner home  
13 on July 9.

14 Dear Judge: Confirmed that my domestic partner's  
15 appointment is 3:30 p.m. on July 9, 2018, not 2:30 p.m., as I  
16 stated earlier. He will be seen by Dr. Jonathan Davis, 136  
17 Sagamore Road, Tuckahoe, New York 10707, 914-337-6400.

18 I will reiterate to her that we will make sure she can  
19 get to that appointment.

20 It will be marked as Court Exhibit 13.

21 (Continued on next page)

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Barrella - Direct

1 (Jury present)

2 THE COURT: Good morning, ladies and gentlemen. I  
3 hope you had a good July 4th, you got some rest, and you're  
4 ready to come back. Thank you.

5 We're ready to proceed.

6 MR. DISKANT: Thank you, your Honor. The government  
7 would at this time offer Government Exhibit 1434, which is a  
8 call dated December 22nd, 2014, between Adam Skelos and  
9 Demetrios Raptis.

10 And that's admitted, your Honor?

11 THE COURT: Yes.

12 (Government's Exhibit 1434 received in evidence)

13 MR. DISKANT: Thank you.

14 THE COURT: It's admitted over objection.

15 MR. DISKANT: And the jury will not have this in their  
16 binder, but we'll bring it up on their screens for them.

17 (Audio recording played)

18 MR. DISKANT: Your Honor, the government calls  
19 Nicholas Barrella.

20 NICHOLAS BARRELLA,

21 called as a witness by the Government,

22 having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. DISKANT:

25 Q. Good morning, Mr. Barrella.

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Barrella - Direct

1 A. Good morning.

2 Q. Where are you employed?

3 A. Capitol Group LLC.

4 Q. What is Capitol Group LLC?

5 A. It's a lobbying firm.

6 Q. And how long have you been employed at Capitol Group?

7 A. 20 years.

8 Q. What's your position?

9 A. Managing partner.

10 Q. What is lobbying?

11 A. Lobbying in the general sense is you represent clients on  
12 issues before the state legislature, the governor's office,  
13 state agencies and public authorities.

14 Q. And you mentioned the state legislature?

15 A. Yes.

16 Q. Would that include the state senate?

17 A. Yes, it does.

18 Q. Is there any particular state that you focus your lobbying  
19 efforts on?

20 A. New York.

21 Q. As part of your lobbying efforts, have you met with New  
22 York State senators?

23 A. Yes, I have.

24 Q. Have you met with members of their staff?

25 A. Yes, I have.

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Barrella - Direct

1 Q. Are you familiar with Senator Dean Skelos?

2 A. Yes, I am.

3 Q. How long have you known Senator Skelos?

4 A. Probably since I have started lobbying, 25 years.

5 Q. And focusing your attention on the time period of 2010 to  
6 2015, was your relationship with Senator Skelos purely  
7 professional?

8 A. No, we were friends.

9 Q. And so focusing on the friends or the personal side of the  
10 relationship during that time period, what did that entail?

11 A. Going to dinner a number of times with our wives.

12 Q. Did you see each other outside of the State of New York?

13 A. Yes, we did.

14 Q. Where did you see each other?

15 A. In Florida.

16 Q. How did you come to see each other in Florida?

17 A. I had a condo in Naples, Florida and he had a condo in Fort  
18 Myers, Florida.

19 Q. Are you familiar with a company called Physicians  
20 Reciprocal Insurers or PRI?

21 A. Yes, I represented them.

22 Q. When you say you represented them, in what capacity did you  
23 represent them?

24 A. As a lobbyist.

25 Q. How did it come to be that you were a lobbyist for PRI?

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Barrella - Direct

1 A. The late Senator Guy Velella introduced me to Anthony  
2 Bonomo, who was the CEO of PRI, and suggested that he add me to  
3 their lobbying team.

4 MR. DISKANT: And if we could show the witness,  
5 Ms. Bustillo, in hard copy, it may be easier, what have been  
6 marked for identification as Government Exhibits 704, 712, 713,  
7 716, 717, 718 and 719.

8 Q. Mr. Barrella, do you recognize these documents?

9 A. I do.

10 Q. What are they?

11 A. They are contracts between Capitol Group LLC and Physician  
12 Reciprocal Insurers.

13 Q. What kind of contracts?

14 A. Lobbying contracts.

15 MR. DISKANT: The government offers 704, 712, 713 and  
16 716 through 719.

17 MR. GAGE: No objection.

18 THE COURT: The Court receives with no objection  
19 Government Exhibits 704, 712, 713 and 716 through 719.

20 (Government's Exhibits 704, 712, 713 and 716 through  
21 719 received in evidence)

22 MR. DISKANT: Ms. Bustillo, if we could publish  
23 Government Exhibit 716.

24 Q. So Mr. Barrella, this is a contract for the year  
25 February 1, 2009 to December 31, 2009. Do you see that down at

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Barrella - Direct

1 the bottom of the first paragraph?

2 A. Yes, I do.

3 Q. Does your signature appear here?

4 A. Yes, it does.

5 Q. And someone has signed on behalf of Physicians Reciprocal  
6 Insurers or PRI?

7 A. Yes.

8 Q. Was this roughly the start of your relationship with PRI?

9 A. Yes, it was.

10 Q. And sticking with that first paragraph, you charge a fee of  
11 \$4,000 per month plus reasonable expenses?

12 A. That's correct.

13 Q. Did you extend this contract for years after 2009?

14 A. Yes, I did.

15 MR. DISKANT: So Ms. Bustillo, if we could bring up --

16 Q. I'm sorry, focusing on that for just a minute, as part of  
17 your agreement, you are being retained to represent them in  
18 front of the New York State Executive Chamber, the New York  
19 State Legislature, and the New York State agencies and public  
20 authorities, do you see that?

21 A. Yes.

22 Q. For issues relating to insurance and medical malpractice?

23 A. That's correct.

24 Q. And just to confirm, would the New York State Legislature  
25 include the New York State Senate?



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Barrella - Direct

1 A. Yes, it does.

2 MR. DISKANT: Ms. Bustillo, if we could bring up  
3 Government Exhibit 717, and just zoom in on the three  
4 paragraphs of the letter.

5 Q. So Mr. Barrella, this particular contract covers the  
6 following year, that is January to December of 2010?

7 A. Yes.

8 Q. And the fee for this year is \$6,000 a month?

9 A. That's correct.

10 Q. Did the general scope of your retention, that is, the scope  
11 of the services you were going to provide, did it change?

12 A. No.

13 Q. And we offered a bunch of other exhibits, do those  
14 generally cover the years 2010 to 2015?

15 A. They do.

16 Q. During each of those years, that is 2010 to 2015, did  
17 Capital Group lobby the New York State Senate on behalf of PRI?

18 A. Yes, it did.

19 Q. During those same years did you meet with senators on  
20 behalf of PRI and its legislative interests?

21 A. Yes, I did.

22 Q. Which senators did you meet with?

23 A. Senator Skelos, Senator DeFrancisco, Senator Hannon and  
24 Senator Martins.

25 Q. And focusing on Senator Skelos in particular, in addition

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Barrella - Direct

1 to meeting with the senator himself, did you ever meet with  
2 members of his staff?

3 A. Yes, I did.

4 Q. Do you recall which members?

5 A. Diane Burman when she was counsel, Rod Mujica, who was  
6 chief of staff and secretary of the finance committee, and then  
7 Beth Garvey when she was chief counsel, and Tom Wickham.

8 Q. When you met with those members of Senator Skelos' staff,  
9 did you believe they had the ability to vote on legislation?

10 A. No.

11 Q. So why did you meet with them?

12 A. It's very important, if you're a good lobbyist, to meet  
13 with the senior staff of leadership or his programming counsel  
14 staff so you can explain the issue and get them to understand  
15 what you're trying to do.

16 Q. And you mentioned leadership. What was Senator Skelos'  
17 position between 2010 and 2015?

18 A. He was senate majority leader.

19 Q. So from a lobbying perspective, is there a functional  
20 difference between meeting with Senator Skelos' staff or  
21 meeting with him in person?

22 A. No.

23 Q. And when you met with senior staff, did you have an  
24 expectation of what, if anything, they would do with the  
25 information you provided?

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Barrella - Direct

1 A. Yes, they would certainly brief the senator and apprise him  
2 of the situation.

3 Q. So going back to PRI, through your work as a lobbyist for  
4 PRI, did you develop an understanding of PRI's various  
5 legislative interests?

6 A. Yes, I did.

7 MR. DISKANT: Ms. Bustillo, could we bring up what is  
8 in evidence as Government Exhibit 3307A.

9 THE COURT: Mr. Barrella, if you bring your mike down  
10 a bit, we'll get less feedback.

11 THE WITNESS: Okay.

12 Q. Mr. Barrella, do you recognize the chart we're looking at?

13 A. Yes, I to.

14 Q. Have you seen it before?

15 A. I have.

16 Q. Up top it says PRI select state law interests 2011 to 2015.  
17 Do you see that?

18 A. Yes, I do.

19 Q. I just want to talk with you about a few of these.  
20 Starting on the very left-hand side of the chart, 2011, the top  
21 box says risk-based capital extension. Do you see that?

22 A. Yes.

23 Q. And the one below it says liquidation restriction  
24 extension, do you see that?

25 A. Yes.

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Barrella - Direct

1 Q. So let's go through those issues. Just very generally,  
2 what is the risk-based capital extension?

3 A. Risk-based capital was a provision in insurance law that is  
4 applied to general commercial carriers and medical malpractice  
5 carriers.

6 Q. And why did it need to be extended?

7 A. We needed to extend our exemption from that because of the  
8 situation of PRI.

9 Q. Were these bills that lapsed or had set time periods to  
10 them?

11 A. Yes, they had sunset dates.

12 Q. And just below that there's the liquidation restriction  
13 extension. Just very briefly, what is that issue?

14 A. That, again, another provision of insurance law dealing  
15 with liquidation and rehabilitation of a carrier who may have  
16 financial stress.

17 Q. Are you familiar with the term "extenders?"

18 A. Yes.

19 Q. Are these types of bills sometimes referred to as  
20 extenders?

21 A. Yes.

22 Q. You mentioned that the CEO of PRI was someone named Anthony  
23 Bonomo?

24 A. That's correct.

25 Q. Did you discuss the extender legislation with Anthony

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Barrella - Direct

1 Bonomo?

2 A. A number of times.

3 Q. Based on those conversations, did you develop an  
4 understanding of whether or not the extender legislation was  
5 significant to him?

6 A. It was very apparent that it was significant to him.

7 Q. Did you have an understanding of why it was significant to  
8 PRI?

9 A. Yes, he felt that for the stability of his company he  
10 needed to push these extenders out to get some relief from  
11 these provisions.

12 Q. Looking down at the bottom left box, the bad doctors or  
13 insurance pool, do you see that issue?

14 A. Yes.

15 Q. Are you familiar with that issue?

16 A. Yes.

17 Q. Can you tell us very generally what that issue is.

18 A. The MMIP is the Medical Malpractice Insurance Pool, and  
19 that is where the high-risk doctors are, and also cases left  
20 over from these high-risk doctors.

21 Q. Did you discuss this issue with Anthony Bonomo?

22 A. Yes.

23 Q. And based on those discussions, did you develop an  
24 understanding of whether or not this issue was significant to  
25 PRI?

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Barrella - Direct

1 A. It was important to PRI.

2 Q. And with respect to the three issues we have now talked  
3 about, that is the risk-based capital extension, the  
4 liquidation restriction extension and the bad doctors insurance  
5 pool, which, if any, of these did you lobby the senate for on  
6 behalf of PRI?

7 A. All three.

8 Q. And which of these did you lobby Senator Skelos for on  
9 behalf of PRI?

10 A. All three.

11 Q. So focusing on 2011 --

12 MR. DISKANT: Ms. Bustillo, if we could keep that up.

13 Q. -- was PRI seeking legislative action on the risk-based  
14 capital extension?

15 A. Yes.

16 Q. And how did PRI hope to accomplish that?

17 A. By having it placed in the budget.

18 Q. When does the budget typically pass?

19 A. March 31st.

20 MR. DISKANT: Ms. Bustillo, if we could bring up for  
21 the witness what has been marked for identification as  
22 Government Exhibit 806.

23 Q. Mr. Barrella, do you recognize this email chain?

24 A. Yes.

25 Q. Are you on it?

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Barrella - Direct

1 A. Yes.

2 Q. Who are you communicating with?

3 A. Rob Mujica, chief of staff of the senator, and Tom Wickham,  
4 who handled health issues for the senator.

5 Q. Does this pertain to PRI's legislative interests?

6 A. Yes, it does.

7 MR. DISKANT: The government offers 806.

8 MR. GAGE: No objection.

9 THE COURT: Government Exhibit 806 is received without  
10 objection.

11 (Government's Exhibit 806 received in evidence)

12 Q. Starting at the bottom, your email is to a J. Wickham and  
13 to a Robert Mujica?

14 A. Right.

15 Q. Who is Mr. Wickham?

16 A. Again, he was on the counsel program staff and he was the  
17 expert on health issues.

18 Q. To which particular senator is he a staff member?

19 A. The senate majority leader.

20 Q. Senator Skelos?

21 A. Yes.

22 Q. Robert Mujica, remind us who he is.

23 A. Chief of staff and secretary of the finance committee.

24 Q. And this is dated March 27, 2011?

25 A. Yes, it is.

I75TSKE1

Barrella - Direct

1 Q. And you write down at the bottom: Is my insurance language  
2 for the medical practice insurers in?

3 Do you see that?

4 A. Yes.

5 Q. What are you referring to?

6 A. To PRI's extenders.

7 Q. And what's the purpose of communicating this issue to  
8 Mr. Wickham and Mr. Mujica?

9 A. Certainly they're negotiating it and they would know the  
10 answer to the question.

11 Q. So Mr. Mujica responds a little bit later that it's still  
12 open. Do you see that?

13 A. Yes.

14 Q. And what do you understand him to be telling you?

15 A. That the health table, as they call it, was still open,  
16 that all the health issues hadn't been closed.

17 Q. Still being negotiated?

18 A. Yes.

19 Q. Did the language you were seeking, the PRI language, make  
20 it into the budget in 2011?

21 A. It did.

22 Q. And what was the significance, if any of that, to PRI and  
23 your client?

24 A. Well, it certainly gave him relief until 2014.

25 MR. DISKANT: Ms. Bustillo, if we bring back up 3307A.



I75TSKE1

Barrella - Direct

1 Q. And sticking with 2011, Mr. Barrella, did PRI have a  
2 legislative interest with respect to its bad doctors insurance  
3 pool?

4 A. Yes.

5 Q. Did you conduct lobbying activities in 2011 on behalf of  
6 PRI with respect to this issue?

7 A. Yes.

8 Q. What, in general terms, did you do?

9 A. We had language drafted and introduced in the senate.

10 MR. DISKANT: So if we could bring up for the witness  
11 what has been marked as Government Exhibit 809, and just  
12 zooming in on the top there.

13 Q. Mr. Barrella, do you recognize this calendar invite?

14 A. I do.

15 Q. Is it for a meeting you attended?

16 A. Yes, it is.

17 Q. And did it pertain to PRI and its legislative interests?

18 A. Yes, it did.

19 MR. DISKANT: The government offers 809.

20 MR. GAGE: No objection, your Honor.

21 THE COURT: Government Exhibit 809 is received without  
22 objection.

23 (Government's Exhibit 809 received in evidence)

24 Q. Mr. Barrella, this appears to be a calendar invite for  
25 Friday, June 3rd, 2011, with Robert Mujica. Do you see that?

I75TSKE1

Barrella - Direct

1 A. Yes.

2 Q. Is that the same individual we have just been talking  
3 about?

4 A. It is.

5 Q. The chief of staff for Senator Skelos?

6 A. It is.

7 Q. And at the top it says the subject the meeting is S5440  
8 DeFrancisco medical malpractice, do you see that?

9 A. Yes.

10 Q. Are you familiar with that bill?

11 A. Yes, I am.

12 Q. What, in general terms, did that bill refer to?

13 A. It had to do with the contingent liabilities from the  
14 medical malpractice insurance pool. It gets placed on the four  
15 regulated medical malpractice carriers in New York State.

16 MR. DISKANT: Ms. Bustillo, if we could bring up for  
17 the witness what has been marked for identification as  
18 Government Exhibit 810.

19 Q. Mr. Barrella, do you recognize this calendar invite?

20 A. I do.

21 MR. DISKANT: The government offers 810.

22 MR. GAGE: No objection, your Honor.

23 THE COURT: Government Exhibit 810 is received without  
24 objection.

25 (Government's Exhibit 810 received received in

I75TSKE1

Barrella - Direct

1 evidence)

2 Q. So this appears to be a little later in June of 2011, again  
3 a meeting with Robert Mujica with you with someone named Greg  
4 Serio, do you see that?

5 A. Yes.

6 Q. Who is Mr. Serio?

7 A. Greg Serio was the former deputy superintendent of  
8 insurance in New York State under Governor George Pataki.

9 Q. And what, if any, relationship did he have with PRI?

10 A. He was senior lobbyist and consultant on insurance matters  
11 to PRI.

12 Q. So just another lobbyist?

13 A. Yes.

14 Q. What was the subject matter of this meeting?

15 A. Again Senate 5440, the DeFrancisco bill.

16 Q. Was this a bill of significance to PRI?

17 A. Yes.

18 Q. Did S5440, the bill we have been talking about, it did go  
19 smoothly?

20 A. No, it did not.

21 Q. What happened?

22 A. Very complex medical malpractice issue, and it just --  
23 people just weren't grasping it.

24 Q. Did S5440 pass?

25 A. No.

I75TSKE1

Barrella - Direct

1 Q. After it failed to pass, did PRI take any additional steps  
2 with regard to this type of legislation?

3 A. Yes, we drafted other iterations of this bill.

4 MR. DISKANT: If we could bring up for the witness  
5 only what has been marked for identification as Government  
6 Exhibit 314.

7 Let's publish 314. Let's go to page 2.

8 Q. Mr. Barrella, do you recognize this bill?

9 A. Yes, I do.

10 Q. What do you recognize it to be?

11 A. It is the revised edition of the previous bill, Senate  
12 5808A by Senator DeFrancisco.

13 Q. What, if any, role did PRI and its lobbyist have with  
14 respect to drafting this particular bill?

15 A. We drafted the bill.

16 Q. Did the bill pass?

17 A. It did.

18 Q. And just remind us, how does Senate 5808A relate to S5440,  
19 the bill that did not pass?

20 A. This is a more palatable, something that people could work  
21 with.

22 Q. And turning to page 5 of the exhibit, up at the top, which  
23 committee did this bill go through?

24 A. Senate rules committee.

25 Q. Who was the chair of the senate rules committee?

I75TSKE1

Barrella - Direct

1 A. Senator Dean Skelos.

2 Q. How did Senator Skelos vote for the bill in the committee?

3 A. Voted yes.

4 Q. If we turn to the next page of the exhibit, the floor vote,  
5 how did Senator Skelos vote on the floor?

6 A. He voted yes.

7 (Continued on next page)

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I755ske2

Barrella - direct

1 BY MR. DISKANT:

2 Q. In addition to casting his vote, what, if anything, did you  
3 understand Senator Skelos to have done in support of passage of  
4 this bill?

5 A. He allowed it to get to the Senate floor.

6 Q. To your understanding, if Senator Skelos, the Majority  
7 Leader, had opposed the legislation, would it have come to the  
8 floor for a vote?

9 A. No.

10 Q. Does the Senate Majority Leader have the ability to block a  
11 bill?

12 A. Yes, he does.

13 Q. If we can bring up for the witness what what is been marked  
14 for identification as Government Exhibit 936?

15 Mr. Barrella, do you recognize this e-mail chain?

16 A. Yes, I do.

17 Q. Are you on it?

18 A. Yes, I am.

19 Q. Does it pertain to the piece of legislation we have been  
20 discussing?

21 A. Yes, it does.

22 MR. DISKANT: The government offers 936.

23 MR GAGE: No objection.

24 THE COURT: Government Exhibit 936 is received,  
25 without objection.

I755ske2

Barrella - direct

1 (Government's Exhibit 936 received in evidence)

2 BY MR. DISKANT:

3 Q. Ms. Bustillo, if we can zoom in on the top half of the  
4 e-mail?

5 So, Mr. Barrella, this is an e-mail from you on June  
6 20th, 2011; do you see that?

7 A. Yes.

8 Q. And the subject line, the bill number, the F5808, the bill  
9 that we have been talking about?

10 A. Yes.

11 Q. And you are writing to Anthony Bonomo? Do you see that?

12 A. Yes.

13 Q. And there are a couple of other folks on the e-mail chain;  
14 Greg Serio. Do you see that?

15 A. Yes.

16 Q. And Katy Neer and Tim Sheridan?

17 A. Yes.

18 Q. And Ms. Neer and Mr. Sheridan are the other employees of  
19 your firm?

20 A. They were.

21 Q. And you write down below: Passed 58 to 4.

22 And then just below that you say: You need to call  
23 and thank -- and you list three different senators. Do you see  
24 that?

25 A. Yes.

I755ske2

Barrella - direct

1 Q. And then, down at the bottom: Of course, a very special  
2 thanks to Senator Skelos. And you provide a phone number for  
3 him?

4 A. Yes.

5 Q. Why are you telling Mr. Bonomo that he should give a very  
6 special thanks to Senator Skelos?

7 A. Because he allowed the bill to get to the floor.

8 Q. Did this bill ultimately become law?

9 A. It did not.

10 Q. Why not?

11 A. It did not pass the Assembly at all.

12 Q. Ms. Bustillo, can we bring back up Government Exhibit  
13 3307-A?

14 So, Mr. Barrella, we have talked about 2011. I now  
15 want to move to 2012, and you see there are some legislative  
16 interests listed for 2012?

17 A. Yes.

18 Q. Did you lobby the State Senate with respect to those?

19 A. Yes, I did.

20 Q. And focusing on the first two, the risk-based capital  
21 extension and the liquidation restriction extension?

22 A. Yes.

23 Q. Now, you testified a moment ago that those extensions  
24 passed in 2011?

25 A. Yes.



I755ske2

Barrella - direct

1 Q. Why are you lobbying to have them extended again in 2012?

2 A. Anthony Bonomo wanted to put the sunset out further past  
3 2014.

4 Q. Did you have an understanding of the potential consequences  
5 for Mr. Bonomo and PRI if the extender legislation was allowed  
6 to expire?

7 A. It could be serious.

8 Q. With respect to the bad doctors pool, the one we were  
9 talking about that didn't pass --

10 A. Right.

11 Q. -- did PRI continue to pursue such a bill?

12 A. Later on, we did.

13 Q. If we can bring up for the witness what has been marked for  
14 identification as Government Exhibit 825?

15 Mr. Barrella, do you recognize this calendar invite?

16 A. I do.

17 Q. Is it for a meeting that you attended?

18 A. Yes, it is.

19 Q. Does it pertain to PRI's legislative interests?

20 A. Yes.

21 MR. DISKANT: Government offers 825.

22 MR GAGE: No objection.

23 THE COURT: Government Exhibit 825 is received,  
24 without objection.

25 (Government's Exhibit 825 received in evidence)

I755ske2

Barrella - direct

1 BY MR. DISKANT:

2 Q. So, Mr. Barrella, this is now late 2011 and it is a meeting  
3 with you and Greg Serio, re budget and medical malpractice  
4 insurance.

5 Do you recognize this?

6 A. Yes.

7 Q. And it is with Robert Mujica. Do you see that?

8 A. Yes.

9 Q. During this meeting, to the best of your recollection, what  
10 was discussed?

11 A. The extenders and other medical practice issues.

12 Q. What was the purpose of having the meeting?

13 A. To start to have a discussion, particularly on getting the  
14 extenders in the budget again.

15 Q. The extenders that we were just talking about?

16 A. Yes.

17 Q. So, turning then to 2012, and these extenders, did there  
18 come a time when you met personally with Senator Skelos?

19 A. I believe so.

20 Q. If we can bring up for the witness only what has been  
21 marked for identification as Government Exhibit 828.

22 Mr. Barrella, do you recognize this calendar invite?

23 A. I do.

24 Q. Is it for a meeting that you attended?

25 A. Yes, it is.

I755ske2

Barrella - direct

1 Q. Did it pertain to PRI and its legislative interests?

2 A. Yes, it did.

3 MR. DISKANT: The government offers 828.

4 MR GAGE: No objection.

5 THE COURT: Government Exhibit 828 is received,  
6 without objection.

7 (Government's Exhibit 828 received in evidence)

8 BY MR. DISKANT:

9 Q. So, let's just go through the attendees for this particular  
10 meeting which looks like it happened on January 18 of 2012.

11 Who attended the meeting?

12 A. Myself, Anthony Bonomo, Greg Serio, Senator Skelos, Rob  
13 Mujica and I believe there was other staff in the room.

14 Q. And during this meeting with Senator Skelos, which  
15 legislative interests did PRI raise?

16 A. A number of them; extenders, overall issues in the medical  
17 malpractice insurance field.

18 Q. And how did Senator Skelos react?

19 A. I think he was attentive and perhaps he would be  
20 supportive.

21 Q. Focusing your attention on the extender legislation in  
22 particular, as of this time, as of January of 2012, did you  
23 have an understanding of how or at what point you were going to  
24 try and get that legislation passed?

25 A. Yes. In the budget.

I755ske2

Barrella - direct

1 Q. If we can bring up for the witness what has been marked for  
2 identification as Government Exhibit 833, Mr. Barrella, do you  
3 recognize this e-mail chain?

4 A. Yes, I do.

5 Q. Who are you communicating with?

6 A. Senator Skelos.

7 MR. DISKANT: Government offers 833.

8 MR GAGE: No objection.

9 THE COURT: Government Exhibit 833 is received,  
10 without objection.

11 (Government's Exhibit 833 received in evidence)

12 BY MR. DISKANT:

13 Q. So, Mr. Barrella, this is now about two months later, March  
14 18, 2012?

15 A. Correct.

16 Q. And just remind us, when did the budget typically pass?

17 A. March 31st.

18 Q. So, you write down at the bottom: Hey Leader, what is  
19 going on with the budget?

20 Do you see that?

21 A. Yes.

22 Q. Why are you asking Senator Skelos what's going on with the  
23 budget?

24 A. Trying to understand where they are in negotiations and if  
25 he felt it was going to come together in time.

I755ske2

Barrella - direct

1 Q. And by it coming together, what are you referring to?

2 A. Agreements on all aspects of the budget.

3 Q. And this was the budget in which PRI was hoping to see its  
4 extenders included?

5 A. Yes.

6 Q. And Senator Skelos responds: Not this week.

7 A. That's correct.

8 Q. If we can bring up for the witness what has been marked as  
9 Government Exhibit 838 and Government Exhibit 841?

10 Mr. Barrella, do you recognize these e-mails?

11 A. Yes, I do.

12 Q. Who are you communicating with?

13 A. With Senator Skelos.

14 MR. DISKANT: Government offers 838 and 841.

15 MR GAGE: No objection.

16 THE COURT: Government's Exhibits 838 and 841 are  
17 received, without objection.

18 (Government's Exhibits 838 and 841 received in  
19 evidence)

20 BY MR. DISKANT:

21 Q. If we can start, Ms. Bustillo, with 838?

22 So, Mr. Barrella, the last e-mail chain we were  
23 looking at was March 18, I believe; this is about a week later?

24 A. Yes.

25 Q. And you are writing to Senator Skelos: Is the budget done?

I755ske2

Barrella - direct

1 A. That's correct.

2 Q. And why are you sending this e-mail to him?

3 A. I am trying to get the status of the budget because I have  
4 issues, particularly the PRI issue.

5 Q. And Senator Skelos responds: Intro some bills last night,  
6 should intro rest today?

7 A. That's correct.

8 Q. And then you say: Is health done?

9 A. Yes.

10 Q. What are you referring to?

11 A. The Health Article 7 budget bill.

12 Q. And why is that of concern to you?

13 A. Because PRI's language would be in that budget bill.

14 Q. And Senator Skelos responds: No?

15 A. "No."

16 Q. And if we can now bring up Government Exhibit 841.

17 This is now the next day?

18 A. Yes.

19 Q. Did PRI's language make it into the budget in 2012?

20 A. It did not.

21 Q. So, down at the bottom you write to Senator Skelos: I know  
22 you are very busy. Anthony's language did not get in.

23 Assembly and Senate agreed but I am hearing Governor's office  
24 said no. It is a big blow to Anthony and he is very  
25 disappointed. Is there anything that could be done?

I755ske2

Barrella - direct

1 Starting with "Anthony's language did not get in,"  
2 what are you referring to?

3 A. The extender language.

4 Q. It didn't make it into the budget?

5 A. No.

6 Q. You write: "Assembly and Senate agreed but I am hearing  
7 Governor's office said no." What do you mean by that?

8 A. That I was under the impression the Senate and Assembly had  
9 agreed to language but the Governor's staff rejected it.

10 Q. And "it is a big blow to Anthony and he is very  
11 disappointed," is that Anthony Bonomo?

12 A. Yes.

13 Q. And Senator Skelos responds: Wrong. Shelly and Gov  
14 rejected.

15 A. That's correct.

16 Q. And what did you understand him to mean by that?

17 A. That meant the Assembly speaker and his staff rejected it,  
18 along with the Governor's staff.

19 Q. Mr. Barrella, did you have an understanding of why the  
20 extender language was rejected?

21 A. To the best of my understanding and ability is that we just  
22 could not get traction in the assembly, they just would not --  
23 they were not buying into it and I know the governor's office  
24 had some concerns, particularly coming from the Department of  
25 Insurance.

I755ske2

Barrella - direct

1 Q. From your perspective, were these extender bills, these  
2 issues, were they easy or were they hard?

3 A. I thought they were very hard to work on.

4 Q. Once the language was rejected from the budget in 2012,  
5 what, if anything, did PRI try to do with respect to  
6 legislation for the extenders?

7 A. Our strategy was to introduce a Senate bill and an Assembly  
8 bill, same-as bills, and get it done through the legislative  
9 process.

10 Q. And did you have occasion to meet with Senator Skelos'  
11 staff regarding that strategy?

12 A. Yes.

13 Q. Ms. Bustillo, if we can bring up for the witness what has  
14 been marked for identification Government Exhibit 842?

15 Mr. Barrella, focusing on the bottom half of the  
16 e-mail; do you recognize it?

17 A. Yes, I do.

18 Q. Is this an e-mail chain that you are on?

19 A. I'm on the chain.

20 MR. DISKANT: Government offers 842.

21 MR GAGE: No objection, your Honor.

22 THE COURT: Government Exhibit 842 is received,  
23 without objection.

24 (Government's Exhibit 842 received in evidence)

25 BY MR. DISKANT:



I755ske2

Barrella - direct

1 Q. Ms. Bustillo, if we can go to page 2?

2 So, Mr. Barrella, down at the bottom this starts as an  
3 e-mail chain from you on 4/3/2012?

4 A. That's correct.

5 Q. So, a couple of days after the budget doesn't pass?

6 A. That's correct.

7 Q. You are saying: Any chance that Greg Serio and I can meet  
8 with Rob tomorrow?

9 A. That's right.

10 Q. What are you seeking a meeting for?

11 A. Talk about the extenders.

12 Q. Ms. Bustillo, if we can bring up for the witness what has  
13 been marked as 307, unless it is in? It is in. Outstanding.  
14 If we can publish 307?

15 Mr. Barrella, do you recognize this bill?

16 A. Yes, I do.

17 Q. What is it?

18 A. It is the Senate Assembly version of the extender bill.

19 Q. The stand-alone bill we were just talking about?

20 A. Yes.

21 Q. And if we can turn to page 2, which committee does this  
22 bill go through?

23 A. The Rules Committee.

24 Q. Senator Skelos is the chair of the Rules Committee?

25 A. Yes, he is.

I755ske2

Barrella - direct

1 Q. How does he vote for it in committee?

2 A. He votes yes.

3 Q. And turning to the next page, the floor vote, this passes  
4 the floor?

5 A. Yes, it does.

6 Q. And how does Senator Skelos vote?

7 A. He votes yes.

8 Q. What, if anything, did PRI do to get this particular bill  
9 passed?

10 A. Worked very hard at it.

11 Q. And aside from casting his vote what, if anything, do you  
12 understand Senator Skelos to have done in support of this bill?

13 A. He allowed it to get to the floor.

14 Q. Did you continue to lobby for PRI in 2013?

15 A. Yes.

16 Q. Did you lobby Senator Skelos?

17 A. Yes.

18 Q. And how about 2014?

19 A. Yes.

20 Q. And did you meet with Senator Skelos or lobby Senator  
21 Skelos in 2014?

22 A. Yes.

23 Q. 2015; did you lobby on behalf of PRI?

24 A. Yes.

25 Q. Do you know someone named Adam Skelos?

I755ske2

Barrella - direct

1 A. I do.

2 Q. How do you know him?

3 A. He is the son of the Senate Majority Leader.

4 Q. Did there come a time when you came to learn of a  
5 connection between Adam Skelos and PRI?

6 A. There did.

7 Q. And what did you understand that connection to be?

8 A. That he had a job there.

9 Q. When, approximately, did you learn that information?

10 A. Probably late December of 2014.

11 Q. Did you learn that information from Dean Skelos?

12 A. No.

13 Q. Who did you learn it from?

14 A. Greg Serio.

15 Q. What, if any reaction, did you have to that information?

16 A. Shocked, and I was a bit concerned about it.

17 Q. So, why were you shocked and a bit concerned?

18 A. Concerned that Adam was working at --

19 MR GAGE: Objection. What is the relevance of this  
20 witness?

21 THE COURT: I will permit it.

22 Go ahead.

23 THE WITNESS: Just concerned that Adam was working at  
24 PRI.

25 BY MR. DISKANT:

I755ske2

Barrella - direct

1 Q. At a time when you had been lobbying for PRI?

2 A. Yes.

3 Q. Between January 2014 and when you learned about Adam  
4 Skelos' job with PRI in I think you said late December 2014,  
5 did you speak with Senator Skelos?

6 A. Yes.

7 Q. How many times?

8 A. A number of times.

9 Q. Did you lobby Senator Skelos on behalf of PRI?

10 A. Yes.

11 Q. Did you discuss with Senator Skelos issues of legislative  
12 interest to PRI?

13 A. Yes.

14 Q. Did you see Senator Skelos socially?

15 A. Yes.

16 Q. In any of those meetings and conversations did Senator  
17 Skelos say anything about Adam Skelos having a job at PRI?

18 A. No.

19 Q. By the way, during that same period of time January 2013 to  
20 late December 2014, did you communicate with Anthony Bonomo?

21 A. Yes, I did.

22 Q. How many times?

23 A. Many times.

24 Q. And did you communicate with Anthony Bonomo about your plan  
25 to lobby Senator Skelos?

I755ske2

Barrella - direct

1 A. Yes, I did.

2 Q. During any of those conversations what, if anything, did  
3 Anthony Bonomo say about the fact that PRI was paying Adam  
4 Skelos?

5 A. He didn't say anything.

6 Q. Sir, we talked briefly a moment ago about the fact that you  
7 continued to lobby on behalf of PRI in 2015; is that correct?

8 A. Yes.

9 Q. If we can bring up for the witness what has been marked as  
10 Government Exhibit 927?

11 Mr. Barrella, do you recognize this e-mail chain?

12 A. Yes, I do.

13 Q. Are you on it?

14 A. Yes.

15 Q. And does it pertain to PRI and its legislative interests?

16 A. Yes, it does.

17 MR. DISKANT: Government offers 927.

18 MR GAGE: No objection.

19 THE COURT: Government Exhibit 927 is received,  
20 without objection.

21 (Government's Exhibit 927 received in evidence)

22 BY MR. DISKANT:

23 Q. So, this is an e-mail to Peter Faherty. Do you see that?

24 A. Yes.

25 Q. Who is Mr. Faherty?

I755ske2

Barrella - direct

1 A. At the time he was counsel to Senator Martins.

2 Q. Another state senator?

3 A. Yes.

4 Q. And there is an attachment: Martins 2015 PRI budget  
5 request?

6 A. That's correct.

7 Q. And you write below: Thanks for the meeting with you and  
8 the Senator regarding PRI. Attached is the PRI budget request.

9 A. That's correct.

10 Q. And, just to be clear, by PRI you are referring to the same  
11 Anthony Bonomo company we have been talking about?

12 A. Yes.

13 Q. Ms. Bustillo, if we can turn to page 2, the attachment; and  
14 this appears to be a letter addressed to Rob Mujica and Beth  
15 Garvey?

16 A. That's correct.

17 Q. Just remind us again, who is Rob Mujica?

18 A. Rob Mujica was chief of staff and secretary of the finance  
19 committee and Beth Garvey was the chief counsel.

20 Q. Chief of staff of Senator Skelos.

21 A. Yes.

22 Q. The same chief of staff you had met with regarding the  
23 prior legislation?

24 A. That's correct.

25 Q. Why are you sending Senator Martins' staff this proposed

I755ske2

Barrella - direct

1 letter to Rob Mujica and Beth Garvey?

2 A. Because Anthony Bonomo of PRI wanted to get the extenders  
3 in the budget again and extend them to December 31st, 2019.

4 Q. Let me ask a little different question.

5 Did you have an expectation of what Senator Martins  
6 would do with this letter?

7 A. Yes.

8 Q. What was that expectation?

9 A. He would definitely write this letter to Rob and Beth and  
10 work very hard at getting it done.

11 Q. And what did you expect Rob, that is, Rob Mujica and Beth  
12 Garvey, to do with this letter?

13 A. As with all budget requests, they would have discussed it  
14 with the Senator.

15 Q. Senator Skelos?

16 A. Yes.

17 Q. And just down at the very bottom of this letter in bold: I  
18 respectfully ask that these two exemptions be extended until  
19 December 31st, 2019, and this be included in the Senate  
20 one-house budget bill.

21 A. That's correct.

22 Q. Whose request is that?

23 A. That's Senator Martins' request.

24 Q. Taking a step back; are these the extenders that PRI was  
25 seeking?

I755ske2

Barrella - direct

1 A. Yes.

2 Q. Did this language make it into the budget in 2015?

3 A. It did.

4 Q. And, do you have an understanding of what, if any role,  
5 Senator Skelos played in causing this language to make it into  
6 the final budget?

7 A. He approved it.

8 Q. Now, we talked a minute ago about Adam Skelos. Did there  
9 come a time when you began working with Adam Skelos?

10 A. Yes.

11 Q. How did that come to be?

12 A. In the fall of 2014, probably around September, I got a  
13 call from Adam Skelos and he was, said that he had a client he  
14 would like to refer to me.

15 THE COURT: Could you keep your voice up, please?

16 THE WITNESS: Okay.

17 BY MR. DISKANT:

18 Q. Do you recall approximately when you got this call from  
19 Adam Skelos?

20 A. Possibly September 14th.

21 Q. September 2014?

22 A. 2014, yes.

23 Q. And what, if anything, did Adam Skelos tell you about what  
24 you would be doing for or with respect to this client?

25 A. Primarily working on public/private partnerships.



I755ske2

Barrella - direct

1 Q. And what are public/private partnerships?

2 A. That is where the government can sell an asset to a private  
3 company for a period of time for them to -- like toll roads,  
4 sewers, projects like that, and they would run it and pay the  
5 government a fee.

6 Q. And, to your understanding in this time period, September  
7 2014, were government public/private partnerships along the  
8 lines of what you just described, were they legal in the State  
9 of New York?

10 A. No, they were not.

11 THE COURT: Would you pull your mic down a bit?

12 A. Okay.

13 Q. In this call with Adam Skelos in which he proposed a  
14 meeting with a new client, on the call, did you agree to take  
15 the meeting?

16 A. No, I did not.

17 Q. Why not?

18 A. Because before I did that I wanted to call the senator.

19 Q. Which senator?

20 A. Senator Skelos?

21 Q. Now, is it typical or a typical for you to call Senator  
22 Skelos before taking on a new client?

23 A. Atypical.

24 Q. Why did you feel in this circumstance that you had to call  
25 Senator Skelos?

I755ske2

Barrella - direct

1 A. It was his son, he is my friend, and he is Senate Majority  
2 Leader and it was appropriate for me to do that.

3 Q. Did there come a time when you in fact placed a call to  
4 Senator Skelos about this issue?

5 A. Yes; a few days later.

6 Q. And, to the best of your recollection on this call, what  
7 did you say to Senator Skelos and what did he say to you?

8 A. I told him that Adam had called me about a client he wanted  
9 to refer to me. And I asked him, you know, what would you like  
10 me to do?

11 Q. And why are you asking Senator Skelos what would you like  
12 me to do?

13 A. It's his son calling me so I think -- for the sake of  
14 appropriateness, I needed to tell him this.

15 Q. How did Senator Skelos react to you giving him this  
16 information?

17 A. I think there was a little bit of a pause and then he said  
18 to me, Nick, under no circumstances is Adam to lobby or go to  
19 Albany.

20 Q. Did Senator Skelos ask you any questions about who this  
21 client was?

22 A. I don't recall any.

23 Q. Did there come a point when you met with Adam Skelos and  
24 the potential client?

25 A. Yes.

I755ske2

Barrella - direct

1 Q. When was that?

2 A. September 22nd.

3 Q. Of 2014?

4 A. Yes.

5 Q. Where was the meeting?

6 A. At the Grand Havana, in New York City.

7 Q. Here in Manhattan?

8 A. Yes.

9 Q. How was the meeting set up?

10 A. It was set up between myself and Adam Skelos.

11 Q. How long did the meeting last?

12 A. Approximately three hours.

13 Q. Who attended?

14 A. Myself, Adam Skelos, and Bjornulf White.

15 Q. Did it occur over a meal?

16 A. Yes, it did.

17 Q. What meal?

18 A. Dinner.

19 Q. So it was a dinner meeting?

20 A. Yes.

21 Q. What issues were discussed at the dinner meeting?

22 A. Public/private partnership and fracking.

23 Q. So we have talked a little bit about public/private  
24 partnership, but what is fracking?

25 A. Fracking is the methodology of getting natural gas out of

I755ske2

Barrella - direct

1 shale.

2 Q. And, as of this time period, September 2014, was that kind  
3 of fracking that you just described permitted in the State of  
4 New York?

5 A. It was not.

6 Q. Was Bjornulf White at the table for the entire dinner  
7 meeting?

8 A. No, he was not.

9 Q. And did there come a point when you and Adam Skelos were  
10 left alone at the table?

11 A. Yes.

12 Q. Did you have a conversation with just Adam Skelos?

13 A. I did.

14 Q. What did you say to him and what did he say to you?

15 A. I just relayed to him that going forward, I wanted to let  
16 him know that his father was very clear, no going to Albany and  
17 no lobbying.

18 Q. And how did Adam Skelos respond?

19 A. He seemed to understand it.

20 Q. Did there come a time when you entered into a formal  
21 agreement with Mr. White's company, with AbTech?

22 A. Yes.

23 Q. If we can bring up what I believe is in evidence as  
24 Government Exhibit 2015 and just turn to page 3?

25 Mr. Barrella, do you recognize this?

I755ske2

Barrella - direct

1 A. I do.

2 Q. Is this your agreement with Bjornulf White and his company?

3 A. It is.

4 Q. And, focusing down on the first paragraph of the letter,  
5 the retainer provides for a time period, do you see that,  
6 November 1st, 2014 to September 30th, 2015?

7 A. Yes.

8 Q. It provides for a fee of \$11,000?

9 A. Yes.

10 Q. How did you arrive at that number?

11 A. I arrived at that number because we were going to engage  
12 another lobbying firm.

13 Q. What was that other firm?

14 A. Meara, Avella, Dickinson.

15 Q. And was there any particular person at that firm that you  
16 planned to work with?

17 A. Mike Avella.

18 Q. He is another lobbyist?

19 A. Yes.

20 Q. And much as the case for the prior agreements we looked at,  
21 this one appears to include lobbying the New York State  
22 legislature. Do you see that?

23 A. Yes, it did.

24 Q. That would include the New York State Senator Skelos?

25 A. Yes, it does.

I755ske2

Barrella - direct

1 Q. After signing this contract, did you participate in a call  
2 regarding your new clients and next steps?

3 A. Yes.

4 Q. Who was on the call?

5 A. Bjornulf White, myself, Tim Sheridan, and Adam Skelos.

6 Q. And you mentioned Tim Sheridan?

7 A. Yes.

8 Q. Who was he?

9 A. He was -- he is my former partner.

10 Q. What was the purpose of the call?

11 A. To discuss strategy.

12 Q. And during that call, did Senator Skelos come up?

13 A. Yes.

14 Q. What was said with regard to Senator Skelos on the call?

15 A. It was --

16 MR GAGE: Objection, your Honor.

17 THE COURT: Hearsay.

18 MR. DISKANT: Your Honor, I believe first it is not  
19 coming in for the truth, it is coming in for the fact that it  
20 was said; but second, the witness is the one who is speaking.

21 THE COURT: All right. I misunderstood the objection.

22 Members of the jury, what you are about to hear is  
23 coming before you not for the truth of what was said but for  
24 the fact that it was said.

25 Go ahead.

I755ske2

Barrella - direct

1 MR. DISKANT: Thank you, your Honor.

2 BY MR. DISKANT:

3 Q. So, on this call with you and Mr. White and Adam Skelos,  
4 what was said with regard to Senator Skelos?

5 A. It was my belief and Mike Avella's belief that we were not  
6 going to lobby the Senator directly but work with other  
7 senators and his staff.

8 Q. And why was it your belief that you were not going to lobby  
9 Senator Skelos directly?

10 A. Because we thought it was -- we were going to be very  
11 appropriate and handle this very circumspect.

12 Q. If we can bring up for the witness what is in evidence as  
13 Government Exhibit 2621?

14 Starting down at the bottom, this is a forward from  
15 Mike Avella?

16 A. Yes.

17 Q. Are you on it?

18 A. Yes, I am.

19 Q. Does it pertain to AbTech and some of AbTech's interests?

20 A. It does.

21 MR. DISKANT: Government offers 2621.

22 MR GAGE: Is it forwarded -- pardon me, your Honor?  
23 Just a moment.

24 THE COURT: Yes.

25 (Counsel conferring)

I755ske2

Barrella - direct

1 MR. BROD: No objection, your Honor.

2 THE COURT: Government Exhibit 2621 is received,  
3 without objection.

4 (Government's Exhibit 2621 received in evidence)

5 BY MR. DISKANT:

6 Q. So, starting down at the bottom, this is from Mike Avella  
7 to you. Do you see that?

8 A. Yes.

9 Q. Remind us who Mike Avella is?

10 A. He was the lobbyist at Meara, Avella, Dickinson that was  
11 working on this issue with us.

12 Q. And down below it says: Below from following, re  
13 infrastructure.

14 Do you see that?

15 A. Yes.

16 Q. It is a piece by Jeffrey D. Klein?

17 A. That's correct.

18 Q. Who was Jeffrey Klein?

19 A. He was the Senate leader of the Democratic Independent  
20 Conference.

21 Q. Another state senator?

22 A. Yes.

23 Q. If we can zoom out, Ms. Bustillo, and just focusing down on  
24 the first paragraph of the article by Mr. Klein down at the  
25 bottom. See it is an article about financing infrastructure



I755ske2

Barrella - direct

1 projects?

2 A. That's correct.

3 Q. And was this of significance to your new client AbTech?

4 A. Yes.

5 Q. We can zoom out, Ms. Bustillo.

6 You forward this on to Adam Skelos?

7 A. Yes, I did.

8 Q. And he responds at 8:38 a.m: No one listens to that guy  
9 anymore.

10 Do you see that?

11 A. That's correct.

12 Q. This is on December 8, 2014?

13 A. That's correct.

14 MR. DISKANT: Ms. Bustillo, if we can leave that up  
15 and bring up next to it what is in evidence as Government  
16 Exhibit 1409 and we would ask the jurors to turn to 1409-T.  
17 This is a call between Dean Skelos and Adam Skelos dated  
18 December 8, 2014, at 8:41 a.m.

19 Ms. Bustillo, if you now want to bring up the  
20 transcript, that's fine.

21 (Audio played)

22 BY MR. DISKANT:

23 Q. Mr. Barrella, you indicated that in addition to  
24 public/private partnerships you were retained by AbTech to help  
25 with fracking?

I755ske2

Barrella - direct

1 A. Yes.

2 Q. Did you have an understanding of what, if any, business  
3 interest AbTech had with respect to fracking?

4 A. They, I believe, had a sponge that dealt with taking the --  
5 recycling the water that comes out of the fracking process.

6 Q. Would AbTech be able to sell that product in the State of  
7 New York at the time that you were retained?

8 A. No.

9 Q. What needed to happen?

10 A. Well, obviously, the government would have to approve  
11 fracking.

12 MR. DISKANT: Your Honor, at this time the government  
13 would like to publish a portion of Government Exhibit 1419 that  
14 is in evidence.

15 Ms. Bustillo, we can take down 2621.

16 This is a call between Adam Skelos and Nick Barrella  
17 dated December 12, 2014 at 7:24 p.m. We are going to play from  
18 the beginning to the bottom of page 2.

19 (audio played)

20 BY MR. DISKANT:

21 Q. Mr. Barrella, what is the general subject matter of the  
22 call we just listened to?

23 A. Fracking.

24 Q. Did you know at the time that this call was being recorded?

25 A. I had no idea.

I755ske2

Barrella - direct

1 Q. Now, we started at the top with: Who is Zucker?

2 A. Yes.

3 Q. Who is Zucker?

4 A. Acting health commissioner.

5 Q. And what, if any relevance, was the acting health  
6 commissioner to the issue of fracking?

7 A. He was supposedly going to do a report on, I believe, the  
8 water quality.

9 Q. Okay.

10 A. It wasn't relevant to me, but.

11 Q. Down at the bottom of page 1 there is reference to Zucker  
12 going around in the Senate.

13 Do you see that down at the bottom of page 1?

14 A. Yes.

15 Q. If we go to the top of page 2, this would be a great spot.

16 You say: Well, I talked to your father last night.

17 Who are you referring to?

18 A. Senator Skelos.

19 Q. And Adam Skelos responds: Well, I have somebody right next  
20 to me that you just said --

21 Who do you understand him to be referring to?

22 A. His father.

23 Q. And you cut him off and say: Okay. All right.

24 Why did you cut him off?

25 A. I wish he hadn't called me with his father standing there.

I755ske2

Barrella - direct

1 I didn't think it was right.

2 Q. As of this time period, December 2014, did you have an  
3 understanding of Senator Skelos' position on fracking?

4 A. Yes.

5 Q. What was that understanding?

6 A. That he supported it.

7 Q. And directing your attention to 2010, do you recall the New  
8 York State Senator Skelos taking up a bill to ban fracking?

9 A. Yes, I do.

10 Q. If we can bring up for the witness only what has been  
11 marked Government Exhibit 302?

12 Mr. Barrella, do you recognize this?

13 A. I do.

14 Q. Is this the 2010 bill to ban fracking?

15 A. It is.

16 MR. DISKANT: Your Honor, the government offers 302.

17 MR GAGE: No objection.

18 THE COURT: Did you say no objection?

19 MR GAGE: I said no objection. Sorry.

20 THE COURT: Government Exhibit 302 is received,  
21 without objection.

22 (Government's Exhibit 302 received in evidence)

23 BY MR. DISKANT:

24 Q. Starting up in the top left-hand corner of what we are  
25 looking at, the title of the bill: Suspend hydrauluc

I755ske2

Barrella - direct

1 fracturing for the extraction of natural gas or oil?

2 A. That's correct.

3 Q. Is hydraulic fracturing another way of referring to  
4 fracking?

5 A. It is.

6 Q. Ms. Bustillo, if we can turn to page 2 this goes to the  
7 Rules Committee?

8 A. It does.

9 Q. How does Senator Skelos vote on the bill to ban fracking?

10 A. He votes yes.

11 Q. And if we can turn to page 3, the floor vote, how does  
12 Senator Skelos vote on the bill to ban fracking?

13 A. He votes yes.

14 Q. Let's switch gears. If I can direct your attention to  
15 January of 2015, did an event of significance to Albany occur?

16 A. Yes, it did.

17 Q. What occurred?

18 A. The speaker was arrested.

19 Q. Who was the speaker?

20 A. Speaker Shelly Silver.

21 Q. And, do you recall approximately when Mr. Silver was  
22 arrested?

23 A. Mid-January.

24 Q. 2015?

25 A. Yes.

I755ske2

Barrella - direct

1 Q. Did there come a point thereafter in January of 2015 when  
2 you recall learning of news reports regarding Dean Skelos?

3 A. Yes, I do.

4 Q. What was the general nature of those reports?

5 A. That he was under investigation.

6 Q. Did you and Capital Group take any action based on those  
7 reports?

8 A. Yes. In concert with Mike Avella, we terminated the AEWS.

9 Q. If we can bring up for the witness what has been marked for  
10 identification Government Exhibit 2308.

11 Mr. Barrella, do you recognize this?

12 A. I do.

13 Q. What do you recognize it to be?

14 A. It is Meara, Avella, Dickinson's termination letter with  
15 Capital Group.

16 MR. DISKANT: Government offers 2308.

17 MR GAGE: No objection.

18 THE COURT: Government Exhibit 2308 is received,  
19 without objection.

20 (Government's Exhibit 2308 received in evidence)

21 BY MR. DISKANT:

22 Q. So, just remind us, Mr. Barrella, were you working alone in  
23 your lobbying efforts on behalf of AbTech?

24 A. No.

25 Q. Who was working with you?

I755ske2

Barrella - direct

1 A. My partner Tim Sheridan and Mike Avella.

2 Q. This is a letter dated January 30th, 2015?

3 A. That's correct.

4 Q. And Mr. Avella signs this?

5 A. Yes.

6 Q. And down below you sign it?

7 A. I did.

8 Q. It says: Please be advised that the lobbying agreement  
9 authorization between Meara, Avella, Dickinson and the Capital  
10 Group on behalf of AEWS Engineering has been terminated January  
11 30th, 2015.

12 Do you see that?

13 A. Yes.

14 Q. Remind us, AEWS, that's the AbTech company you had been  
15 working for?

16 A. Yes.

17 Q. It says: As no lobbying was done and no compensation  
18 received for lobbying, there are no reporting requirements.

19 A. That's correct.

20 Q. Mr. Barrella, based on your participation in some of the  
21 events we discussed, did you agree that no lobbying had been  
22 done?

23 A. No.

24 Q. Focusing on the component that says no compensation was  
25 received, had you been paid by AEWS?

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Barrella - direct

1 A. Yes.

2 Q. We can direct your attention to March of 2015. Did you  
3 have a conversation with Senator Skelos about Adam Skelos?

4 A. Yes, I did.

5 Q. Where were you?

6 A. At my house.

7 Q. Who was present?

8 A. Just myself and the senator.

9 Q. During that conversation, focusing on Adam Skelos, what did  
10 the senator say to you?

11 A. Just in passing that he was -- that Adam had been let go by  
12 the water company.

13 Q. And, what did you understand him to mean by the water  
14 company?

15 A. AbTech.

16 Q. Did you respond?

17 A. I did not.

18 Q. Why not?

19 A. Didn't feel it needed a response.

20 MR. DISKANT: Your Honor, if I can just have a moment?

21 THE COURT: Yes.

22 MR. DISKANT: Nothing further.

23 THE COURT: Mr. Gage?

24 MR GAGE: Thank you, your Honor.

25 CROSS EXAMINATION



i755ske2

Barrella - cross

1 BY MR GAGE:

2 Q. Good morning, Mr. Barrella.

3 A. Mr. Gage.

4 Q. I represent Dean Skelos, as does Ms. Shapiro and  
5 Mr. Ozarowski.

6 I want to go back and just talk about the function of  
7 lobbying generally. One thing a lobbyist does all the time is  
8 set up meetings; is that correct?

9 A. That's correct.

10 Q. That really is a core function of a lobbyist, right?

11 A. I would say so.

12 Q. And the purpose of setting up meetings is to educate the  
13 audience, correct?

14 A. That is correct.

15 Q. And those can be elected representatives?

16 A. Yes.

17 Q. And they can also be, I believe you mentioned, government  
18 agencies?

19 A. Yes.

20 Q. And, in connection with New York State government, what  
21 government agencies, for example, would you set up meetings  
22 for?

23 A. Department of Insurance, Environmental Conservation, Health  
24 pretty much.

25 Q. Generally speaking, what were the purpose of those

i755ske2

Barrella - cross

1 meetings?

2 A. Would be to talk about possibly bring a client in or talk  
3 about an issue that affected our client by those agencies, be  
4 it a law or a regulatory issue.

5 Q. Often it would be with regard to government agencies, for  
6 example, to educate those agencies, correct?

7 A. That is correct.

8 Q. And, at times you would bring in subject matter experts,  
9 correct?

10 A. Yes.

11 Q. Now, in connection with meetings you would often deal with  
12 staff I believe you have testified?

13 A. Yes. That's true.

14 Q. And that's because staff often included various subject  
15 matter experts, correct?

16 A. That is correct.

17 Q. And obviously we have seen the names of some of Senator  
18 Skelos' staff, correct?

19 A. Yes.

20 Q. Robert Mujica, for example?

21 A. Yes.

22 Q. I take it you view him as a highly knowledgeable, highly  
23 qualified individual?

24 A. Extremely professional.

25 Q. And Ms. Elizabeth Garvey, I take it you have the same

i755ske2

Barrella - cross

1 opinion of her?

2 A. Yes.

3 Q. Extremely professional and knowledgeable?

4 A. Without a doubt.

5 Q. Now, I want to go back and look at some of the legislation  
6 the government showed you. If we could start with, I believe

7 it is Government Exhibit 304. Do you recognize this,

8 Mr. Barrella, as the 2011 extender legislation?

9 A. Yes.

10 Q. And Mr. Ozarowski, if we could scroll to the floor vote,  
11 please?

12 Mr. Barrella, do you see the floor vote there on March  
13 30th, 2011?

14 A. I do.

15 Q. The government asked you how Senator Skelos voted but what  
16 was the floor vote on the senate?

17 A. 57 yes.

18 Q. How many nays?

19 A. 4.

20 THE COURT: Let me ask you to slow down a bit.

21 Q. Again, what was the vote on the floor?

22 A. 57 yes, and -- oh, sorry -- 5 nos.

23 Q. Fair to say the Senate support for the extender was  
24 overwhelming, correct?

25 A. Yes.

i755ske2

Barrella - cross

1 Q. And you understood Senator Skelos, obviously, was  
2 supportive of the extender?

3 A. Correct.

4 Q. And heading into this session you understood Senator Skelos  
5 was supportive of the extender?

6 A. I did.

7 Q. And for as long as you have known him or lobbied to him,  
8 Senator Skelos has always been in support of the extender,  
9 correct?

10 A. That's correct.

11 Q. Let's go to the next piece of legislation the government  
12 showed you, I believe it is Government Exhibit 307.

13 This is the extender legislation for 2012, correct?

14 A. That is correct.

15 Q. And Mr. Ozarowski, if we could go to the floor vote,  
16 please?

17 The government asked you how Senator Skelos voted and  
18 as you responded he voted yes. What was the floor vote on the  
19 Senate?

20 A. 58 yes, one no.

21 Q. So, again, fair to say the support in the Senate for the  
22 2012 extender was overwhelming, correct?

23 A. Correct.

24 Q. Let's go back, if we could, Mr. Ozarowski, to Government  
25 Exhibit 841, please.

i755ske2

Barrella - cross

1           Now, Mr. Barrella, if we could step back and talk a  
2 little bit about during this time frame from 2010 -- why don't  
3 we say 2011 through 2015. Fair to say there are three branches  
4 of government in New York State, correct?

5       A. That is absolutely correct.

6       Q. And during that time frame there was always a democratic  
7 governor, correct?

8       A. Correct.

9       Q. And there was always a democratic controlled assembly,  
10 correct?

11      A. That's correct.

12      Q. And for legislation to become law, it wouldn't be just the  
13 Senate but would also have to be -- the Assembly would have to  
14 pass the bill and the Governor would have to sign the bill,  
15 correct?

16      A. That is correct.

17      Q. So now we are going back to the effort that you have  
18 described to include the extender in the budget bill in 2012,  
19 correct?

20      A. That's correct.

21      Q. And as you testified, that wasn't successful, correct?

22      A. It was not.

23      Q. Senator Skelos supported that, correct?

24      A. He did.

25      Q. But it was blocked by the Assembly Speaker Sheldon Silver?

i755ske2

Barrella - cross

1 A. Yes.

2 Q. And Governor Cuomo, correct?

3 A. That's correct.

4 Q. So, what we are seeing there in Government Exhibit 841 is  
5 Dean telling you that the reason the extender was not included  
6 in the budget bill at the end of March 2012 is because  
7 Mr. Silver and Governor Cuomo blocked it, correct?

8 A. That's correct.

9 Q. He was supportive of it being included, correct?

10 A. Yes, he was.

11 Q. And the Senate was supportive of it being included,  
12 correct?

13 A. Yes.

14 Q. Let's go to Government Exhibit 314, please, and go to the  
15 next page if we could, Mr. Ozarowski, and the next page after  
16 that, if we have one. Got it. Thank you.

17 This, too, is a situation where the governor and the  
18 assembly had some concerns about the proposed legislation,  
19 correct?

20 A. Yes.

21 Q. And, as you pointed out, it wasn't just Senator Skelos who  
22 you would lobby in connection with legislation, correct?

23 A. That's correct.

24 Q. Senator Seward, for example?

25 A. Yes.

i755ske2

Barrella - cross

1 Q. Who was Senator Seward?

2 A. Chairman of the Senate Insurance Committee.

3 Q. Who is Senator DeFrancisco.

4 A. Chair of the Senate Finance Committee.

5 Q. You lobbied Senator DeFrancisco also?

6 A. Yes.

7 THE COURT: Please, slow down.

8 MR GAGE: Pardon, your Honor.

9 Q. And Senator Hannon?

10 A. Yes, we did.

11 Q. Who is Senator Hannon?

12 A. Chair of the Senate Health Committee.

13 Q. And why did you lobby these gentlemen?

14 A. Pretty much they all had input and oversight on this issue  
15 because it was insurance but health policy.

16 Q. I understand.

17 Stepping back again it is fair to say, and I guess we  
18 have seen an example of it, but legislation, passing  
19 legislation often involves compromise; is that correct?

20 A. That's correct.

21 Q. There has to be a give and take, correct?

22 A. That's correct.

23 THE COURT: Please slow down for the court reporter.

24 Q. Now, in connection with the 2012 extender, why did you  
25 approach Senator Martins about supporting that legislation?

i755ske2

Barrella - cross

1 A. Senator Martins' district, PRI -- PRI's offices were in his  
2 Senate district and there was 400 jobs. So, he would certainly  
3 be interested in supporting this.

4 Q. And the other senators we have mentioned, Senator  
5 DeFrancisco, Senator Hannon, Senator Seward, the leaders of the  
6 various committees, I take it they also supported the extender  
7 legislation, correct?

8 A. Yes.

9 Q. No doubt about that, correct?

10 A. No.

11 Q. And you explained that certain legislation that you  
12 attempted to advance on the behalf of PRI just go too bogged  
13 down because it was too complicated, correct?

14 A. That's correct.

15 Q. And part of the function of that legislation you have  
16 described, I'm not going to go back over it in detail --

17 A. Right.

18 Q. -- but it got bogged down because the Assembly would not be  
19 supportive of it, correct?

20 A. Yes.

21 Q. Now, are you aware of a de-authorization order that was  
22 issued on July 6, 2017 and directed to AFP?

23 MR. DISKANT: Objection.

24 THE COURT: Just a moment.

25 Grounds?



i755ske2

Barrella - cross

1 MR. DISKANT: Relevance, and 608.

2 THE COURT: I will permit it.

3 MR. DISKANT: Your Honor, can we approach on this?

4 THE COURT: Yes.

5 (Continued next page)

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Barrella - cross

1 (At side bar)

2 MR. DISKANT: So, it seems like where we are about to  
3 go is getting into the DFS order that Mr. Bonomo was  
4 cross-examined about. Now, there are a number of problems with  
5 that.

6 First, this witness has no firsthand knowledge of that  
7 so anything this witness would know about would be some  
8 combination of hearsay or speculation. That's problem number  
9 one. Problem number two is that to the extent it is being  
10 elicited to try and impeach Anthony Bonomo, then it runs a foul  
11 of 608 which prohibits them from offering extrinsic evidence to  
12 impeach Mr. Bonomo. And three, it has absolutely no relevance  
13 to the scope of this witness' testimony which focuses very  
14 squarely on 2010 to 2015 and his interactions with Senator  
15 Skelos.

16 MR GAGE: The witness, in response to the government's  
17 questioning, has, on multiple occasions, explained the purpose  
18 essentially of the extender, as other witnesses, to preserve  
19 this not negative capital status for PRI. If the witness had  
20 known that in fact significant monies were being diverted by  
21 Anthony Bonomo away from the business purpose of PRI, the  
22 witness might have had a different view of the position he took  
23 in connection with his employment by and support of that  
24 extender. So, for example, your Honor, when the witness heard  
25 about press stories relating to Senator Skelos, it caused him

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Barrella - cross

1 to terminate his employment relationship with AbTech, I think  
2 technically AEWS Engineering. So, I think it is fair game to  
3 ask would he have, after some foundation, have continued to  
4 represent Anthony Bonomo if he knew that the conduct described  
5 in the de-authorization order was occurring. And, of course,  
6 the conduct in the de-authorization order was during the  
7 2010-2014 time period.

8 MR. DISKANT: There are two problems with that, your  
9 Honor. The first is that it assumes something that is not in  
10 evidence which is that it assumes whatever Mr. Bonomo was doing  
11 would have some impact on these legislative interests.  
12 Mr. Gage didn't explore that with Mr. Bonomo because I think he  
13 knows the issue is far more complicated than that. So, the  
14 entire foundation that this is going to be feeding the witness  
15 information that, one, is not entirely accurate, and two, I  
16 assure you the witness has no firsthand knowledge of. The  
17 second thing is even assuming that the witness was way in the  
18 weeds on these issues, which is he is not, it has no relevance  
19 here except to impeach Anthony Bonomo which is impermissible  
20 under 608.

21 THE COURT: I agree with the government on 608 and  
22 relevance so I sustain their objection.

23 MR GAGE: I understand.

24 If I may, I disagree with the government's  
25 characterization of the examination of Mr. Bonomo, but I

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Barrella - cross

1 understand your Honor's ruling and so I will move on.

2 THE COURT: Thank you.

3 (Continued on next page)

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Barrella - Cross

1 (In open court)

2 THE COURT: Members of the jury, I sustain the  
3 objection.

4 BY MR. GAGE:

5 Q. Mr. Barrella, I ask if we could pull up Government  
6 Exhibit 314 again.

7 And we talked about some of this legislation, but I  
8 want to refer you to January 1st -- pardon me, January 4, '12,  
9 you see it says died in assembly, correct?

10 A. That's correct.

11 Q. With regard to the news stories that you observed and you  
12 say caused you to terminate your relationship with AEWS, do you  
13 recall that one was an NBC news report?

14 A. I do not recall that.

15 Q. What reporting did you observe?

16 A. I don't recall the specific issue, and it sort of went  
17 beyond just those stories.

18 Q. Now the extender also passed in the budget bill of  
19 March 2015, is that correct?

20 A. That is correct.

21 Q. And once again the Republican senate support for that was  
22 overwhelming, correct?

23 A. Yes.

24 Q. Never a doubt the Republican senate would support the  
25 extender, correct, in the majority?

I75TSKE3

Barrella - Cross

1 A. Yes, that's correct.

2 Q. Now if we could go to Government Exhibit 2308, please.

3 By the way, going back for just a minute to 2012, when  
4 you say it was difficult, it was difficult because as, we have  
5 seen in Government Exhibit 481, the governor and the assembly  
6 were not in support, correct?

7 A. That is correct.

8 Q. The difficulty was that you knew Senator Skelos supported  
9 the bill -- the extender, correct?

10 A. That is correct.

11 Q. So the difficulty wasn't Senator Skelos, and we've seen the  
12 floor vote of the Republican senate, correct?

13 A. That's correct.

14 THE COURT: Please slow down.

15 Q. Okay. If we could take a look at Government Exhibit 2308,  
16 and specifically, the second paragraph.

17 Let me ask you first -- well, it says as no lobbying  
18 was done. Let me back up it, if I could. The letter is  
19 addressed -- I want to look at who the letter was addressed to.

20 So this letter is addressed to the New York State  
21 Commission on Public Ethics, correct?

22 A. That's correct.

23 Q. And this letter is a public filing, is that correct?

24 A. That is correct.

25 Q. That you are required under law to make, correct?

I75TSKE3

Barrella - Cross

1 A. Yes.

2 Q. And now if we can go to the first paragraph, it says:

3 Please be advised the lobbying agreement/authorization between  
4 Meara, Avella, Dickinson and the Capitol Group LLC, on behalf  
5 of AEWS Engineering, has been terminated on January 30, 2015.

6 Do you see that?

7 A. Yes, I do.

8 Q. As I understand it, your firm is the Capitol Group,  
9 correct?

10 A. That's correct.

11 Q. And when you were contacted by AEWS Engineering, you  
12 brought in the firm of Meara, Avella, Dickinson, is that  
13 correct?

14 A. I did.

15 Q. And the combination of the two of you were charging AEWS  
16 Engineering \$11,000 a month?

17 A. That is correct.

18 Q. And it says "as no lobbying was done," that statement is  
19 false, correct?

20 A. In my opinion, yes.

21 Q. "And no compensation received," that statement is also  
22 false, correct?

23 A. Capitol Group did receive compensation.

24 Q. So you told the New York State Commission on Public Ethics  
25 that no lobbying was done when in fact lobbying was done,

I75TSKE3

Barrella - Cross

1 correct?

2 A. Mike Avella was telling me that.

3 Q. Well --

4 A. Mike Avella was telling me that based on his opinion, and  
5 he supposedly -- opinion of other opinion that he had received,  
6 so I'm not saying it.

7 Q. Well, sir, you're a highly experienced lobbyist.

8 A. I'm a highly experienced lobbyist, and at the time there  
9 was a lot going. And he was former counsel to majority  
10 leaders, and he said this is what I'm telling you, you're going  
11 to sign this letter.

12 Q. And you have been a lobbyist for over two decades, correct?

13 A. Yes.

14 Q. And you know what lobbying is, correct?

15 A. I thought I did.

16 Q. And you knew when you signed this letter that you had in  
17 fact lobbied on behalf of AEWS Engineering?

18 A. The Capitol Group lobby -- that's not saying Capitol Group  
19 didn't lobby, that's saying Avella, Dickinson, Meara didn't  
20 lobby.

21 Q. I'm asking you, sir, did you lobby on behalf of AEWS  
22 Engineering?

23 A. I did.

24 Q. Did you receive compensation on behalf from AEWS  
25 Engineering?



I75TSKE3

Barrella - Cross

1 A. I did. I certainly did.

2 Q. And in the bottom left-hand corner of the document, if we  
3 could highlight that, you can see that you have signed the  
4 document?

5 A. I did.

6 Q. So you are affirming the false statement that no lobbying  
7 was done, correct?

8 A. At the time that is not what I thought I was doing, but  
9 again, we had a difference over -- myself and Mike Avella and  
10 my partner Tim Sheridan, we had a definite difference of  
11 opinion of what went on.

12 Q. But sir, that's your signature?

13 A. Yes, it is my signature.

14 Q. You're affirming that, the statement that no lobbying went  
15 on, correct?

16 A. Yes.

17 Q. And you're also affirming the false statement that you  
18 received no compensation, correct?

19 A. No, that's not correct. That's Mike Avella saying that.  
20 I'm not saying that. He's terminating from me. He returned  
21 the check to me that I gave him. And he is saying in that  
22 letter that he did no lobbying and that he received no  
23 compensation.

24 I want to point out that Capitol Group filed all their  
25 reports and insisted that AEWS file a semi annual report. We

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Barrella - Cross

1 never said -- Capitol Group never said to J. Co. that we did no  
2 lobbying.

3 Q. Mr. Avella returned the money that he received in  
4 connection with AEWS?

5 A. Yes, he did.

6 Q. Did you return the money you received in connection with  
7 AEWS lobbying?

8 A. I did not.

9 Q. And as a consequence, of signing -- strike that.

10 No action was taken against you as a result of signing  
11 this letter?

12 A. Correct.

13 Q. And no action was taken against your firm, the Capitol  
14 Group, for having signed this letter?

15 A. That is correct.

16 Q. Despite the fact that it has the representations in it that  
17 we have gone over?

18 A. That's correct.

19 Q. One last topic, if I may, which is you talked about the  
20 lobbying team at PRI had in place when you joined it.

21 A. Yes.

22 Q. Would you describe the lobbying team.

23 A. Brian Meara, who was the managing partner of Meara, Avella  
24 & Dickinson, Greg Serio, who was a partner in Park Strategies,  
25 and then myself.

I75TSKE3

Barrella - Cross

1 Q. So three separate lobbying firms?

2 A. Yes.

3 Q. And who was the first, Mr. Meara?

4 A. Brian Meara.

5 Q. And what was his specialty, so to speak?

6 A. He was one of the best lobbyist in Albany.

7 Q. Did he focus on any particular group?

8 A. He could lobby both houses, particularly he was strong in  
9 the assembly.

10 Q. And Mr. Serio, who was Mr. Serio employed by?

11 A. Greg Serio was at Park Strategies. He was a partner to  
12 Senator Al D'Amato, and he had been a former superintendent of  
13 insurance.

14 Q. And yourself completed the group?

15 A. That's correct.

16 MR. GAGE: Thank you.

17 No further questions at this time, your Honor.

18 THE COURT: Mr. Brod.

19 MR. BROD: Thank you, Judge.

20 CROSS-EXAMINATION

21 BY MR. BROD:

22 Q. Good morning, Mr. Barrella.

23 A. Good morning.

24 Q. My name Julian Brod, and with my colleagues John Kenney and  
25 Allison Angel, I represent Adam Skelos in this matter.

I75TSKE3

Barrella - Cross

1           You and I have never spoken before, have we?

2       A.   We have never spoken.

3       Q.   You've known my client, Adam Skelos, for much of his adult  
4       life, correct?

5       A.   Yes.

6       Q.   Known him since his early 20s, right?

7       A.   Yes.

8       Q.   You first met him at a fund raiser, correct?

9       A.   Yes.

10      Q.   And during the time that you have known Adam, he was a  
11      familiar face at fundraisers and political events, correct?

12      A.   Yes, to some degree.

13      Q.   In Albany and in New York City, too?

14      A.   Albany, I could say Albany.

15      Q.   You live in Albany, right?

16      A.   Yes.

17      Q.   And most of your work as a lobbyist focuses on Albany,  
18      correct?

19      A.   That's correct.

20      Q.   And it's your job to know what's going on in the state  
21      capital, right?

22      A.   That's correct.

23      Q.   It's your job to provide information about what is going on  
24      in the state capital to your clients, right?

25      A.   That is correct.

I75TSKE3

Barrella - Cross

1 Q. You've spoken about a couple of your lobbying clients  
2 today, PRI and AEWS, but you have a number of other clients --  
3 all over the years you have had a number of clients, correct?

4 A. That's correct.

5 THE COURT: The court reporter is indicating that it's  
6 difficult to keep up with you. Could you slow down?

7 MR. BROD: I will, Judge.

8 Q. And in September of 2015, Adam Skelos told you that he  
9 wanted to introduce you to a company called AEWS, correct?

10 A. That is correct.

11 Q. I apologize, in September 2014.

12 A. That's correct.

13 Q. And he told you a little bit about AEWS, correct?

14 A. Yes, he did.

15 Q. And you understood it was an engineering firm based in  
16 North Carolina, correct?

17 A. Yes, I did.

18 Q. And you understood it was a subsidiary of a company called  
19 AbTech, correct?

20 A. I didn't clearly understand that that was -- it was more a  
21 sister company in some way. I don't think it was ever made  
22 clear it was a subsidiary.

23 Q. You understood they were affiliated?

24 A. They were affiliated.

25 Q. And you came to understand that Adam was a consultant for

I75TSKE3

Barrella - Cross

1 AbTech, correct?

2 A. Yes.

3 Q. And that he was being paid by AbTech, correct?

4 A. No, he was going to be paid by AEWS.

5 Q. I think you misunderstood my question. You understood that  
6 Adam was being paid by AbTech?

7 A. Yes, I'm sorry.

8 Q. You didn't think that Adam was making this introduction  
9 merely as a volunteer?

10 A. No.

11 THE COURT: If you slow the wording of your questions  
12 we won't need to interrupt.

13 MR. BROD: Will do.

14 Q. And before you undertook to go further with the engagement,  
15 you placed a call to Senator Dean Skelos, correct?

16 A. That is correct.

17 Q. And you did that in part because you and he were friends,  
18 correct?

19 A. That is correct.

20 Q. And the discussions about this representation had been  
21 between you and the senator's son, correct?

22 A. That is correct.

23 Q. And you did it in part because he was senate majority  
24 leader, correct?

25 A. That is correct.

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Barrella - Cross

1 Q. And you didn't want him to find out through other channels  
2 that you were working with his son, correct?

3 A. That is correct.

4 Q. And then there came a time when you met with Adam Skelos  
5 and Bjornulf White, correct?

6 A. Yes.

7 Q. And you testified, I think, that that occurred in  
8 Manhattan, correct?

9 A. That did.

10 Q. And you understood that Mr. White was the president and  
11 chief executive of AEWS?

12 A. Yes, I did.

13 Q. And it was your understanding at that point that he would  
14 be your point of contact on this representation?

15 A. Yes.

16 Q. He was your client, correct?

17 A. He was my client.

18 Q. Okay. And at that first meeting Mr. White did a lot of the  
19 talking, correct?

20 A. He did.

21 Q. And he told you -- well, he told you that AEWS was in need  
22 of design build or P3 legislation?

23 A. Yes, he did.

24 Q. He told you that that was because they have a project out  
25 in Nassau County, correct?

I75TSKE3

Barrella - Cross

1 A. I believe he referred to that project, but he was looking  
2 at -- I think he was looking at more of a state-wide approach  
3 to it.

4 Q. And you and he discussed how similar public private  
5 partnership legislation had been done in other states, correct?

6 A. Yes, I believe we talked about that.

7 Q. And it seemed reasonable to you to attempt to do this in  
8 New York, correct?

9 A. I thought that Bjornulf was very intelligent, articulate on  
10 the subject matter, and I saw no reason why, based on the way  
11 he presented it, why we shouldn't go forward with it.

12 Q. So ultimately you entered into a lobbying agreement with  
13 AEWS, right?

14 A. That's correct.

15 Q. And that was in early November, correct?

16 A. Yes.

17 Q. And the agreement was effective November -- withdrawn.

18 And under the terms of your lobbying agreement with  
19 AEWS, you were being paid \$11,000 a month, correct?

20 A. That's correct.

21 Q. And you brought in another lobbying firm of Avella,  
22 Dickinson to assist, correct?

23 A. That is correct.

24 Q. Why did you do that?

25 A. I think that this was a big issue, and it was going to



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Barrella - Cross

1 require a lot of work, not just in the senate but in the  
2 assembly and with the governor's office.

3 Q. And a lot of your lobbying work over the years has focused  
4 on New York State Republicans, correct?

5 A. No, I wouldn't characterize that. I can work -- I work  
6 bipartisan.

7 Q. But one of the reasons that you brought in Mike Avella was  
8 because he has focused his lobbying work on Democrats, correct?

9 A. No. Mike came from the Senate Republicans.

10 Q. And so your initial understanding was you would be lobbying  
11 on P3 legislation, correct?

12 A. Correct.

13 Q. And there came a time when Mr. White and Mr. Skelos asked  
14 to you help them with regard to fracking, correct?

15 A. Yes.

16 Q. And at the time there was a moratorium in New York on  
17 fracking?

18 A. There was.

19 Q. A moratorium imposed by the executive branch?

20 A. Yes.

21 THE COURT: Please slow down.

22 Q. And a moratorium is essentially the same thing as a ban,  
23 correct?

24 A. Yes.

25 Q. Towards the end of 2014 there were rumors that Governor

I75TSKE3

Barrella - Cross

1 Cuomo was going to lift the moratorium on fracking in New York,  
2 correct?

3 A. There were some rumors.

4 Q. You didn't think it was going to happen though, did you?

5 A. I worked for his father, no. I didn't have a crystal ball,  
6 but I just thought the environmental advocates, the River  
7 Keepers, and there was a Kennedy working on this, that in the  
8 end they were going to prevail.

9 Q. One of the reasons that AEWS asked for your help with  
10 regard to fracking was to set up a meeting with the New York  
11 State Department of Environmental Conservation, correct?

12 A. That is correct.

13 Q. And why did they want that meeting?

14 A. Because the Department of Environmental Conservation had  
15 issued the old AEGI, whatever they called it, the AEGIS sort of  
16 regulations, and they were going to have oversight on all  
17 aspects of fracking. They share -- they would share oversight  
18 with the health department, but they would -- certainly on  
19 issues like trucking water or recycling wastewater from the  
20 fracking method, they were going to -- they already had issued  
21 sort of a regulation on that. So they were going to have  
22 oversight on that.

23 Q. And AEWS, that's the company that Mr. White was running,  
24 wanted the Department of Environmental Conservation to  
25 implement regulations requiring a hundred percent recycling of

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Barrella - Cross

1 wastewater, correct?

2 A. That is correct.

3 Q. Fair to say Mr. White was a challenging client?

4 A. Yes, he was.

5 Q. He wasn't sufficiently engaged with the representation,  
6 correct?

7 A. No, he was hired to get in contact with and asked him to  
8 come to meetings.

9 Q. Adam Skelos stepped into this vacuum, fair?

10 A. Yes.

11 Q. And as the representation progressed, he became your  
12 primary point of contact for representation?

13 A. I'd call him the go between.

14 THE COURT: Please slow down.

15 Q. And just focusing on fracking, in mid-December 2014,  
16 Governor Cuomo did indeed make a decision on the moratorium,  
17 correct?

18 A. He did.

19 Q. He decided to keep the moratorium in place, correct?

20 A. Absolutely.

21 Q. And at that point you and your colleagues refocused on the  
22 P3 legislation, correct?

23 A. That's correct.

24 Q. And in January 2015, Adam started pushing you and your  
25 colleagues quite hard on the P3 legislation, right?

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Barrella - Cross

1 A. Right.

2 Q. And Mike Avella, who we have spoken about, came up with the  
3 idea of setting up meetings with senators, correct?

4 A. He did.

5 Q. And you and he identified two particular senators who it  
6 would be a good idea for Mr. White to meet with, correct?

7 A. I believe so.

8 Q. Those senators were Senators Croci and Venditto, correct?

9 A. Venditto, yes.

10 Q. Venditto, thank you.

11 THE COURT: I think it would be a good idea for  
12 Mr. Barrella to pause. After you hear a question, just pause  
13 so the court reporter can accurately reflect what's being said.

14 THE WITNESS: Yes, your Honor.

15 Q. And these are both senators from Long Island, correct?

16 A. That is correct.

17 Q. And both of their districts had been impacted by Hurricane  
18 Sandy, correct?

19 A. Yes.

20 Q. So they knew firsthand the problems that can be associated  
21 by stormwater, correct?

22 A. That is correct.

23 Q. And stormwater is a perennial problem on Long Island,  
24 correct?

25 A. From my understanding, that's correct.

I75TSKE3

Barrella - Cross

1 Q. Just taking a step back, part of your job as a lobbyist is  
2 to identify legislators who may be helpful with a particular  
3 piece of legislation, correct?

4 A. That is correct.

5 Q. And you do that based on your knowledge of Albany and your  
6 connections, right?

7 A. Yes.

8 Q. That's part of the value that you bring as a lobbyist,  
9 right?

10 A. To some degree, yes.

11 Q. And you go to senators who you think may be sympathetic to  
12 your client's position and you try and garner their support,  
13 correct?

14 A. That is correct.

15 Q. That's in fact what you did here in this representation for  
16 AEWS, correct?

17 A. That is correct.

18 Q. And you were being paid \$11,000 a month, correct?

19 A. Yes.

20 Q. Part of that was going to another firm, Dickinson Avella,  
21 correct?

22 A. Yes.

23 Q. And you never at any point felt like you were a front for  
24 lobbying activity by Adam Skelos, did you?

25 A. No.

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Barrella - Cross

1 Q. And the idea in setting up these meetings with Senator  
2 Croci and Senator Venditto was to get the P3 legislation on  
3 about governor's budget, correct?

4 A. Yes.

5 Q. That was a budget which you anticipated would be passed in  
6 April, correct?

7 A. Just before April.

8 Q. End of March?

9 A. Yes.

10 Q. And you set up meetings for Mr. White in January 2015 with  
11 these two senators, correct?

12 A. I believe we did. I didn't do it directly.

13 Q. But your firm did, correct?

14 A. Yes.

15 Q. And Mr. White did not actually attend those meetings, did  
16 he?

17 A. No, he did not.

18 Q. And you also set up a meeting for Mr. White with Adam  
19 Spence, correct?

20 A. I believe my partner did.

21 Q. And Mr. Spence at the time was the governor's assistant  
22 secretary for economic development, correct?

23 A. That is correct.

24 Q. And this was part of the effort to get the P3 legislation  
25 and the governor's budget, correct?

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Barrella - Cross

1 A. That's right.

2 Q. And that budget you anticipated would be forthcoming in  
3 March, the end of March 2015, correct?

4 A. Correct.

5 Q. And Mr. White did not attend the meeting with Mr. Spence,  
6 did he?

7 A. No, he did not.

8 Q. And is it fair to say that you felt that AEWS was not as  
9 committed to this engagement as maybe they should be?

10 A. Well, I think our opinion was we were very troubled that we  
11 could not get Bjornulf to give his undivided attention on a  
12 very serious matter.

13 Q. You tried to do your job and your client got in the way,  
14 right?

15 A. Yes, in some ways that happened.

16 Q. Focusing your attention on the middle of January 2015,  
17 January 22nd, Assembly Speaker Sheldon silver was arrested on  
18 federal corruption charges, correct?

19 A. That is correct.

20 Q. And Speaker Silver was at the time one of most powerful  
21 politicians in New York State, correct?

22 A. That is correct.

23 Q. Just describe briefly the powers that he, as assembly  
24 speaker, had at that time.

25 A. Well, he certainly controlled the ebb and flow of

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Barrella - Cross

1 legislation through the assembly. He had a large majority, so  
2 he certainly had a lost of influence over policy issues and  
3 other issues, legislation.

4 Q. Just to remind the jury, the state assembly has, over the  
5 last quarter century, largely been controlled by the Democrats,  
6 correct?

7 A. That is correct.

8 Q. While Republicans have largely controlled the state senate,  
9 correct?

10 A. That is correct.

11 Q. So it was a shock when Speaker Silver was arrested, right?

12 A. Yes.

13 Q. Can you describe the atmosphere in Albany at that time?

14 A. It was very chaotic.

15 Q. People were anxious?

16 A. Certainly.

17 Q. Politicians were anxious?

18 MR. McKAY: Objection to foundation.

19 A. Yes, they were.

20 THE COURT: Sustained.

21 Q. I think you testified that you do most of your lobbying  
22 work in Albany, correct?

23 A. Yes.

24 Q. And it's your job to take the temperature of the state  
25 capital and relay that information to your clients, correct?



I75TSKE3

Barrella - Cross

1 A. It is.

2 Q. Fair to say that you know an awful lot about what goes on  
3 in Albany, correct?

4 A. Yes.

5 Q. Okay. Lobbyists after Sheldon Silver's arrest were  
6 nervous, right?

7 A. Very much so.

8 Q. In fact, you knew at the time that one of your lobbyists,  
9 Brian Meara, who you mentioned, had been subpoenaed?

10 MR. DISKANT: Objection, relevance.

11 THE COURT: I'll permit it.

12 Q. You knew at the time that a lobbyist, Brian Meara, who you  
13 mentioned in your testimony, had been subpoenaed?

14 A. What time frame are we talking about? I'm not sure I knew  
15 in January.

16 Q. In early 2015.

17 A. Yes.

18 Q. And you knew that politicians in Albany were also nervous  
19 and anxious about federal investigations?

20 A. Yes.

21 Q. It was a time of high stress in the state capital, right?

22 A. Without question.

23 Q. It was around this time or the end of January 2015, about a  
24 week after Sheldon Silver's arrest, that you terminated your  
25 lobbying agreement with AEWS, correct?

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Barrella - Cross

1 A. Correct.

2 MR. BROD: Could we bring up for the witness  
3 Government Exhibit 2308, which is in evidence.

4 Q. And you've testified about this document. This is Meara  
5 Avella's termination notice, correct?

6 A. That is correct.

7 Q. And it was transmitted to the Joint Commission on Public  
8 Ethics, correct?

9 A. It is.

10 Q. And you signed the document, right?

11 A. I did.

12 Q. And you testified earlier today that there are statements  
13 in here that you do not think were accurate, correct?

14 A. Fair to say that.

15 Q. And it was on this day, give or take one, that you  
16 terminated your representation of AEWS, correct?

17 A. Correct.

18 Q. And the reason you terminated your representation of AEWS  
19 was your feelings of anxiety about what was going on in Albany,  
20 correct?

21 A. A little more than that. Mike Avella, who I respect, and  
22 his lawyer, former counsel to the majority leaders, came up and  
23 said I'm giving you advice that we're terminating, and I  
24 strongly recommend that you terminate. So that entered into  
25 the equation.

I75TSKE3

Barrella - Cross

1 Q. Is it fair to say that in times of anxiety, such as the  
2 last week of January 2015, people do things that -- people make  
3 mistakes, correct?

4 MR. DISKANT: Objection.

5 THE COURT: Sustained.

6 Q. You testified earlier that you found out that Adam had been  
7 working for PRI in December 2014, correct?

8 A. Approximately that time.

9 Q. You testified that you were shocked to find this out,  
10 right?

11 A. Yes.

12 Q. Do you remember having a dinner with my client, Adam  
13 Skelos, and your wife and Adam's uncle, Charles Silverstein,  
14 and his wife Carla Silverstein at a restaurant called Amo's in  
15 the winter of 2013 and 2014?

16 A. I don't recall.

17 Q. Do you recall in 2015 you met with the government several  
18 times to discuss this case?

19 A. I never met with the governor to the discuss this case.

20 THE COURT: I'm sorry, what was the answer?

21 A. Did you say the government or the governor?

22 Q. I think you misunderstood my question. You met with the  
23 government, the prosecutors.

24 A. Yes.

25 Q. And you told the prosecutors that upon discovering that

I75TSKE3

Barrella - Cross

1 Adam was working for PRI, you had concerns?

2 A. Yes.

3 Q. You did not tell them that you were shocked, did you?

4 A. I don't recall the exact words, but concern was definitely  
5 in there. Shock could have been in there, but let's say  
6 concern.

7 Q. Okay. Do you recall telling them, as you testified today,  
8 that you found out about Adam's work at PRI from Greg Serio?

9 A. That is correct.

10 Q. Do you recall telling them that about a year after you  
11 found out about Adam's work with PRI you discovered Adam was  
12 having attendance problems at PRI?

13 A. I don't recall talking about Adam's attendance problems at  
14 all.

15 MR. BROD: Could we call up just for the witness  
16 3503-11. Just focusing on the middle -- the third paragraph  
17 down, please.

18 Q. If you could review that, Mr. Barrella, and I'll have some  
19 questions about it.

20 A. That refreshes my memory.

21 Q. You recall now that you told the government in 2015 that  
22 Greg Serio had told you about Adam's work at PRI?

23 A. Yes.

24 Q. And you recall now that a year or so later you learned that  
25 Adam had been -- had not been showing up to work, correct?

I75TSKE3

Barrella - Cross

1 A. What I learned all came from Greg Serio.

2 Q. Yes, but does this refresh your recollection that you told  
3 the government that it was about a year after you first learned  
4 about Adam's employment with PRI that you learned that he was  
5 having attendance problems?

6 MR. DISKANT: Your Honor, could we approach on this?  
7 I think the document is not being read correctly.

8 THE COURT: All right. Yes.

9 (Continued on next page)

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I75TSKE3

Barrella - Cross

1 (At sidebar)

2 MR. DISKANT: So as an initial matter, I intentionally  
3 avoided eliciting this because it is hearsay, and I thought  
4 they would object to it, but the witness is certainly prepared  
5 to testify to exactly what Serio told him. I think the year or  
6 so later here refers to when after the job started Mr. Barrella  
7 found out about it, which is entirely consistent with what he  
8 said all along, if the job started in 2013, he had that  
9 conversation with Greg Serio in late 2014. I think the witness  
10 is getting confused with an imprecise paragraph, but don't  
11 think there's an inconsistency here.

12 MR. BROD: Judge, on the hearsay point, I'm not  
13 looking to elicit to content of the conversation that occurred,  
14 I'm just focused on the time period. He testified that he  
15 found out in December 2014 about Adam's work with PRI and he  
16 was shocked at that point. I think he found out much earlier.  
17 I think that's consistent with -- I will show the Court the  
18 language, but it says that he had a conversation with Serio and  
19 a year or so later Barrella learned that. That's what I'm  
20 trying to get out, that he learned about it earlier, and the  
21 testimony about "shocked" is a little implausible. That's all  
22 I'm trying to do.

23 MR. DISKANT: If the questions come out that way, they  
24 come out that way, but I don't think an inconsistency has been  
25 established yet.

I75TSKE3

Barrella - Cross

1 MR. KENNEY: Your Honor, our client has gone to the  
2 bathroom. Could we take a short break?

3 THE COURT: Yes. How much longer?

4 MR. BROD: About two minutes, your Honor.

5 MR. KENNEY: He should be back in a minute.

6 MR. McKAY: Perhaps we could linger at sidebar until  
7 his return.

8 MR. DISKANT: If we're going to spend a moment here, I  
9 think it's worth pointing out that this report says that when  
10 Mr. Barrella first found out, they were concerned about Adam's  
11 job and thought it was inappropriate because PRI lobbied the  
12 state government.

13 So I'm not really sure where Mr. Brod is going with  
14 this, but this is very clearly consistent with what he has  
15 said, that whenever it is he found out about it, whether a year  
16 later or he found out about it months later, his reaction is  
17 exactly what he testified to. And the problem with the way  
18 Mr. Brod is presenting this to the jury is it leads to the  
19 false impression that Mr. Barrella has somehow changed his  
20 story, and I don't think there's an adequate basis in the  
21 document for that line of questioning.

22 MR. BROD: I think he may be mistaken about the date  
23 when he first learned about it, and I want to question his  
24 question his testimony that he was shocked.

25 THE COURT: I'm sure you're trying to slow down, but

I75TSKE3

Barrella - Cross

1 it's very challenging for the court reporter to follow you.

2 MR. BROD: I apologize.

3 (Continued on next page)

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I75TSKE3

Barrella - Cross

1 (In open court)

2 BY MR. BROD:

3 Q. Mr. Barrella, does reviewing the document that I showed you  
4 refresh your recollection that at some point you learned from  
5 Greg Serio about Adam Skelos' employment at PRI, and that a  
6 year or so later you learned that Adam had not been showing up  
7 to work?

8 A. Yes.

9 Q. Okay. But it's fair to say that in December 2014 you had  
10 concerns about Adam's employment at PRI?

11 A. It's fair to say that.

12 MR. BROD: And could we call up for the witness and  
13 the jury Government Exhibit 2615, which is in evidence, and  
14 could we move through to I think the third page.

15 Q. Mr. Barrella, you have been asked a couple of questions  
16 about this document. This is your engagement letter with AEWS,  
17 correct?

18 A. That's correct.

19 Q. Provides for you to be paid \$11,000 a month, correct?

20 A. That is correct.

21 Q. Doesn't include a term, correct, it's not like a contract  
22 for one year or any other term like that, is it?

23 A. It ends September 15, 2015.

24 Q. But you understood you had the right to terminate this  
25 agreement if you saw fit to do so, correct?

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1 A. Yes.

2 Q. And you continued your engagement for AEWS through the end  
3 of January 2015, correct?

4 A. I believe we terminated at the end of January, so I would  
5 have to say yes.

6 Q. And you knew during December and January that Adam was a  
7 consultant for AbTech, correct?

8 A. Yes.

9 Q. Which was an affiliate of AEWS, correct?

10 A. Yes.

11 Q. And knew he was working closely on this matter, correct?

12 A. Unfortunately, yes.

13 Q. And --

14 THE COURT: Please slow down.

15 MR. BROD: Yes, Judge.

16 Q. And the P3 legislation that we have spoken about, that was  
17 ultimately not included in the governor's budget, was it?

18 A. That's correct.

19 Q. And it was not passed by the senate?

20 A. I don't think any legislation was introduced.

21 MR. BROD: Thank you. No further questions.

22 MR. DISKANT: No redirect.

23 THE COURT: All right. Thank you, you may step down.

24 THE WITNESS: Thank you.

25 THE COURT: Members of the jury, I'm going to have a

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1 brief sidebar and then we'll talk about scheduling.

2 (At sidebar)

3 THE COURT: Can you give me your view of scheduling?

4 MR. McKAY: Yes, your Honor. We'll offer a few  
5 exhibits through stipulation now or when we resume, and Special  
6 Agent Mergen, the summary witness, is probably 10 to 20 minutes  
7 on direct. And at that point, after cross is done, we would be  
8 prepared to rest.

9 Our understanding had been that the defense was going  
10 to have their Nassau County witness today. I understand that's  
11 not the case. They would like to start tomorrow. So I guess  
12 the question is should we push through with Agent Mergen now or  
13 break for lunch?

14 THE COURT: Well, I think from the jury's standpoint  
15 it would be better to bring for lunch.

16 Your witness is definitely not available today?

17 MR. BROD: Judge, we understood from the discussion on  
18 Tuesday that the government was going to call their two  
19 witnesses, rest, we would go straight into the charging  
20 conference and the defense case would begin Friday.

21 THE COURT: I understand. That's where we left it.

22 MR. BROD: I just didn't want to leave the impression  
23 we were doing anything wrong.

24 THE COURT: I was just hoping that had changed.

25 MR. BROD: No, we informed the Nassau County witness

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1 if he testifies, he will testify tomorrow, and we'll be able to  
2 make a decision on his testimony at the conclusion of the  
3 government's case.

4 THE COURT: I thought you were all going to be  
5 negotiating about a stipulation.

6 MR. BROD: It's a different witness, your Honor. It's  
7 Ken Arnold, but if he testifies he will testify not just as a  
8 records custodian but substantively.

9 MR. McKAY: So we understand, your Honor, we haven't  
10 yet learned whether in fact they're going to call this witness,  
11 and so we can talk about that at the lunch break? We should  
12 probably excuse the jury.

13 THE COURT: For the day?

14 MR. McKAY: No, just for the lunch break. We need to  
15 do the summary witness.

16 MR. KENNEY: I might add, your Honor, the witness has  
17 been subpoenaed and has agreed to show up tomorrow morning.

18 THE COURT: All right. I'll let the jury go to lunch  
19 and we'll resume at 12:20.

20 (In open court)

21 THE COURT: Members of the jury, the trial is  
22 progressing more quickly than anticipated initially. We're  
23 going to have a brief break in your presence here in order for  
24 us to take up legal matters this afternoon. So you will have  
25 extra time this afternoon and then we'll resume Friday.

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1 We'll take a lunch break now until 12:20.

2 MR. McKAY: Your Honor, could we be clear the jury is  
3 coming back at 12:20?

4 THE COURT: Yes, you're coming back at 12:20.

5 (Jury not present)

6 THE COURT: See you at 12:20.

7 MR. DISKANT: To dovetail with the issue we raised at  
8 sidebar, we have no 3500, no defense exhibits for any  
9 witnesses, we don't have any firm sense of the order of which  
10 the witnesses are going to testify. They told us about two  
11 potential witnesses, Mr. Arnold and another witness who is  
12 available tomorrow. We don't have a representation as to  
13 whether or not there will be any witnesses beyond those two,  
14 including whether or not if the defendants plan to testify,  
15 which would obviously be a very significant event. So ask for  
16 guidance from the defense on witness order, how many witnesses  
17 they intend to call, when they intend to produce 3500 material  
18 and exhibits.

19 THE COURT: The government is certainly entitled to  
20 that. Who is speaking for Dean Skelos?

21 MR. GAGE: Your Honor, I will. We will be calling one  
22 witness in the morning. We are trying to determine what  
23 exhibits, if any -- I think there will be some we will use with  
24 that witness, we'll alert the government when we're able to do  
25 that.

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1 THE COURT: What are the exhibits?

2 MR. GAGE: Largely related to legislation, including  
3 some of the exhibits just produced today. I think they would  
4 include the Red Act 2011, these various extenders and other  
5 legislation that has been referenced.

6 THE COURT: All right. Now you're saying you may call  
7 another witness tomorrow?

8 MR. GAGE: We will definitely be calling one witness.  
9 I would defer to Adam Skelos' counsel as to whether or not they  
10 will be calling the witness from Nassau County and/or we could  
11 enter into a stipulation to admit certain documents. I should  
12 let them speak for themselves, but I think there are certain  
13 documents that they -- we'll join them, we seek to admit by  
14 agreement.

15 THE COURT: And Senator Dean Skelos will not testify?

16 MR. GAGE: Your Honor, we'll make that decision when  
17 the defense rests, but I will say right now the government -- I  
18 said the defense, when the government rests, pardon me, your  
19 Honor, long morning.

20 THE COURT: Yes.

21 MR. GAGE: This afternoon I anticipate we will advise  
22 the government of how we intend to proceed on that.

23 THE COURT: Thank you.

24 Mr. Brod.

25 MR. BROD: Judge, we may call the Nassau County

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1 witness who we discussed at sidebar. If so, I think he will  
2 probably be the first witness on tomorrow. He will not be a  
3 long witness.

4 Mr. Diskant said we have not given them any guidance  
5 on additional witnesses. We have. We sent them a witness list  
6 and advised them that we're intending to call the four or five  
7 people on that list. We advised them of that several days ago.  
8 So I think they have a good sense of what we may do.

9 As to 3500 material, I don't believe we have any 3500  
10 material for this Nassau County witness. He's someone who the  
11 government is familiar with, has interviewed. And as for  
12 exhibits, we will, of course, if we do call him, provide those  
13 exhibits to the government this afternoon or early evening.  
14 The government will not be surprised by what they are. They  
15 are all documents that the government produced to us and which  
16 they're familiar with.

17 THE COURT: And as to your client?

18 MR. BROD: I think, Judge, just at this moment I  
19 wouldn't be prepared to put a representation on the record as  
20 to his testimony, but it's something that we would anticipate  
21 being able to inform the government of later this afternoon if  
22 not earlier.

23 THE COURT: All right. Good.

24 MR. McKAY: Just one quick question, your Honor,  
25 perhaps we can -- once we get a better sense of the defendants,

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1 whether they're testifying, in the event that they have two  
2 short witnesses, the two they just referenced, I assume we  
3 would finish tomorrow morning. We would be prepared to go to  
4 closings tomorrow afternoon if the defendants don't testify,  
5 but we would like to get a sense of whether the Court would  
6 like us to do that. We certainly won't be able to do  
7 everyone's closings tomorrow afternoon, but I imagine we could  
8 start our closing and get through some portion, if not most of  
9 the way through it, but we wanted to get a sense from the Court  
10 as to that.

11 THE COURT: Assuming that we finalize the charge  
12 today, that would I think that would be a good use of jury  
13 time.

14 Do defense counsel wish to be heard on this?

15 MR. KENNEY: Your Honor, we're prepared to proceed as  
16 the Court wishes.

17 MR. GAGE: And we agree, your Honor.

18 THE COURT: Good. Thank you. If there's nothing  
19 else, we'll take a lunch break until 12:20.

20 MR. McKAY: Thank you, your Honor.

21 (Luncheon recess taken)

22 (Continued on next page)



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## A F T E R N O O N   S E S S I O N

12:20 p.m.

THE COURT: While he is checking, just a moment on scheduling. How long do counsel need to review the latest draft of the charge? I don't know if you have already done it or whether you need time.

MR. McKAY: We have reviewed it and are ready to proceed, as soon as the Court is ready.

MS. SHAPIRO: Your Honor, we have reviewed it. We may need like a 10 or 15-minute break between when you let the jury go and when we start the charge conference, if that's all right.

THE COURT: Certainly.

MR. KENNEY: That will be fine with us, your Honor.

THE COURT: Good. Thank you.

I'm sorry we weren't able to red line this for you. There were so many lines, rainbows running into rainbows.

We are now ready for the jury.

(Continued on next page)

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(Jury present)

THE COURT: The government calls?

MR. McKAY: The government calls Special Agent Tracee Mergen.

TRACEE MERGEN,

called as a witness by the Government,  
having been duly sworn, testified as follows:

THE COURT: You may.

MR. McKAY: Thank you, your Honor. And before I begin questioning the witness, I will read a stipulation and offer a few exhibits.

First we offer Government Exhibit 1, which is a stipulation between the parties. Can you publish that, Ms. Bustillo?

It is hereby agreed, between the parties, that during each year, from 2010 through 2015, New York State received more than \$10,000 in federal benefits.

Is that admitted, your Honor?

THE COURT: Yes, it is. It is Government Exhibit 1. Government Exhibit 1 is received, without objection.

(Government's Exhibit 1 received in evidence)

MR. McKAY: I will also now offer a number of exhibits pursuant to Government Exhibit 10, which is already in evidence, that's the stipulation regarding phone records. I will offer the following exhibits: 103, 104, 105, 107, 109-A,

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110, 111, 113, 114, 115-B through 115-D, 117, 119.

THE COURT: Is there any objection?

MR. KENNEY: No objection.

THE COURT: I receive, without objection, Government's Exhibits 103, 104, 105, 107, 109-A, 110, 111, 113, 114, 115-B through 115-D, 117, and 119.

(Government's Exhibits 103, 104, 105, 107, 109-A, 110, 111, 113, 114, 115-B through 115-D, 117, 119 received in evidence).

MR. McKAY: Lastly, your Honor, I will offer, pursuant to Government Exhibit 12, which relates to Dean Skelos' official calendars, I will offer the following exhibits: 2010-A-1, 2010-B, 2011-A through 2011-D, 2011-F through 2011-I, 2011 I-1, 2011-J, 2011-K, 2012-A, 2012-C, 2012-E, 2012-F, 2012-F-1, 2012-G, 2012-H, 2012-I, and 2012-J, 2013-A, 2013-C through 2013-F, 2014-B and 2014-C, and 2015-A through 2015-E.

THE COURT: I take it there is no objection?

MR. KENNEY: No objection.

MR GAGE: No objection.

THE COURT: Government's Exhibits 2010-A, 2010-B, 2011-A through 2011-D, 2011-F through 2011-I, 2011-I-1, 2011-J, 2011-K, 2012-A, 2012-C, 2012-E, 2012-F, 2012-F-1, 2012-G, 2012-H, 2012-I and 2012-J, 2013-A, 2013-C through 2013-F, 2014-B and 2014-C, 2015-A through 2015-E.

(Government's Exhibits 2010-A, 2010-B, 2011-A through

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Mergen - direct

1 2011-D, 2011-F through 2011-I, 2011-I-1, 2011-J, 2011-K,  
2 2012-A, 2012-C, 2012-E, 2012-F, 2012-F-1, 2012-G, 2012-H,  
3 2012-I and 2012-J, 2013-A, 2013-C through 2013-F, 2014-B,  
4 2014-C, 2015-A through 2015-E received in evidence).

5 MR. McKAY: Thank you, very much, your Honor.

6 DIRECT EXAMINATION

7 BY MR. McKAY:

8 Q. Special Agent Mergen, where do you work?

9 A. The FBI.

10 Q. What is your title?

11 A. Special agent.

12 Q. How long have you been with the FBI?

13 A. A little over two years.

14 Q. Are you in a particular unit?

15 A. I am.

16 Q. What unit?

17 A. The public corruption unit.

18 Q. Did there come a time when you became involved in this  
19 case?

20 A. Yes; in approximately April of 2018.

21 Q. In connection with this case, have you been asked to review  
22 and analyze certain records and documents that were admitted  
23 into evidence at this trial?

24 A. I have.

25 Q. What types of records and evidence?

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Mergen - direct

1 A. I analyzed a lot of e-mails, phone records which are also  
2 called toll records, and I analyzed Senator Skelos' official  
3 calendar.

4 Q. Were you asked to review certain charts that had been  
5 created that summarized that evidence?

6 A. I was.

7 Q. Who created those charts?

8 A. Another FBI agent who used to be in my squad created them,  
9 along with the prosecutors in this case.

10 Q. And, did you compare those charts to the underlying  
11 evidence to review the accuracy of the information in the  
12 charts?

13 A. I did.

14 Q. With respect to phone numbers that are represented in the  
15 charts, how were you able to verify the phone numbers that were  
16 used in the charts?

17 A. Well, many ways. Some of the phone numbers were testified  
18 to in this trial, many of the phone numbers were verified  
19 through exhibits admitted in this trial such as toll records  
20 which included subscriber information which means that --

21 THE COURT: A little slower, please?

22 THE WITNESS: I apologize -- which includes subscriber  
23 information which refers to the person who -- the person who  
24 subscribes to that, who the phone belongs to.

25 Q. Ms. Bustillo, will you bring up for the witness what's been

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Mergen - direct

1 marked for identification as 3303-B?

2 Do you recognize this, Special Agent Mergen?

3 A. I do.

4 Q. What is it?

5 A. It is the charts that we were just talking about.

6 MR. McKAY: The government offers Government Exhibit  
7 3303-B.

8 THE COURT: I am accepting this with an instruction to  
9 the jury.

10 MR. KENNEY: We note our objection, your Honor.

11 THE COURT: Yes.

12 The government is about to show you a chart that  
13 summarizes certain evidence that has already been admitted.  
14 The chart was created by the government and it is not, itself,  
15 evidence. It is being shown to you merely as the government's  
16 analysis and summary of voluminous documents. When you view  
17 this chart, you should keep in mind that it is the underlying  
18 evidence that determines what weight, if any, the chart  
19 deserves. It is for you to decide whether the chart correctly  
20 presents the information contained in the evidence on which it  
21 is based.

22 MR. McKAY: Thank you, your Honor.

23 THE COURT: I receive Government Exhibit 3303-B, over  
24 objection.

25 (Government's Exhibit 3303-B received in evidence)

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Mergen - direct

1 BY MR. McKAY:

2 Q. Special Agent Mergen, looking here at the first of this  
3 chart, let's walk the jury through what this represents.

4 First, what date does this page refer to?

5 A. February 8, 2012.

6 Q. If we look at the first line that begins 11:00 a.m.; what  
7 does that represent?

8 A. It refers to a meeting that took place at the RSA office,  
9 both Dean Skelos and Leonard Litwin attending that meeting,  
10 among others.

11 Q. Where do you get that information from?

12 A. From an exhibit admitted in this trial, specifically  
13 GX- 2012-B.

14 Q. If you see after where it says Dean meeting, that's the  
15 citation to the exhibit?

16 A. Correct.

17 Q. Then if we look down at 11:51 a.m., what does that line  
18 represent?

19 A. It represents a phone call made by Dean Skelos to Adam  
20 Skelos.

21 Q. And if you look next to Dean there is an asterisk. What  
22 does it mean when there is an asterisk next to a phone record?

23 A. It means that the person who made the call made it but the  
24 recipient did not answer the call.

25 Q. And how are you able to tell that that is a missed call?

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Mergen - direct

1 A. I was able to tell because the call does not appear on the  
2 recipient's telephone records, in this case Adam Skelos.

3 Q. So, if we look down at the bottom right-hand corner do you  
4 see the indication GX- 101 and GX- 108?

5 A. I do.

6 Q. What does that represent?

7 A. Those refer to exhibits admitted at this trial,  
8 specifically they were exhibits of the toll records of both  
9 Dean and Adam Skelos.

10 Q. So, if you look at the next line, 11:57 a.m., there are no  
11 asterisks there. What does that mean?

12 A. That means the call was connected.

13 Q. And so, can you see that call on both parties' phone  
14 records?

15 A. Yes.

16 Q. We don't see it on this page but in some instances there  
17 are one-minute phone calls that have two asterisks. What does  
18 that represent?

19 A. When there are two asterisks that means that we are not  
20 sure whether or not the phone connected or not. We know that  
21 the caller made the call but because we don't have the  
22 recipient's toll records, we don't know whether they answered  
23 it.

24 Q. So, for calls that have one or two asterisks -- let me ask  
25 you this.



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Mergen - direct

1           Next to each phone call you have either one minute or,  
2 here, three minutes. What does that represent?

3 A. That's the duration of the call.

4 Q. For calls that either are or may be missed calls, what did  
5 you list as the duration?

6 A. One minute.

7 Q. Are there also some calls that were connected that were  
8 actually just a minute long?

9 A. Correct.

10 Q. So the way you tell is whether there is an asterisk or not?

11 A. Correct.

12 Q. If we look at the fourth line, 12:28 p.m.; what does that  
13 represent?

14 A. This refers to an e-mail admitted into evidence. It was  
15 sent by Charles Dorego to Steven Ross and Bruce Beal.

16 Q. You see there it says: E-mail: I saw Dean today...

17 A. Correct.

18 Q. Where does that come from?

19 A. It comes from the content of the e-mail.

20 Q. Is that GX- 1228?

21 A. Correct.

22 Q. Just to be clear, when there is an e-mail and you have a  
23 dot, dot, dot like that, is that the whole e-mail or just the  
24 relevant portion of the e-mail?

25 A. Just the relevant portion.

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Mergen - direct

1 Q. So, let's take another example, if you can turn to slide 2.  
2 What dates does this page refer to?

3 A. September 19th and 25th, 2012.

4 Q. And if we look at the entry on September 19th at 12:30  
5 p.m.; what does that represent?

6 A. It represents a meeting, a REBNY meeting attended by both  
7 Dean Skelos and Charles Dorego.

8 Q. And if we look -- by the way, do you see the far left  
9 column we have got "9/19 Wed." Is that Wednesday?

10 A. Yes.

11 Q. Is and then below that 9/25 Tuesday?

12 A. Correct.

13 Q. So, everything to the right of that is on that date?

14 A. Correct.

15 Q. Now, looking at September 25th, six days after the 19th, at  
16 9:25 a.m. what does Mr. Dorego say to Adam Skelos?

17 A. Mr. Dorego e-mails Adam: BTW, who do you sell title  
18 insurance for?

19 Q. And what does Adam say back at 10:25?

20 A. Adam replies: I work with a company in Long Island, East  
21 Coast Abstract.

22 Q. What's the next line at 10:41?

23 A. Adam makes a call to Dean Skelos.

24 Q. What happens at 10:56?

25 A. Adam sends another e-mail to Charles Dorego.

I755ske4

Mergen - direct

1 Q. What is first sentence of that e-mail?

2 A. "I just heard there may be some bad history there with  
3 Stan. I had no idea."

4 Q. If we can turn to the next page, Ms. Bustillo?

5 Is this a continuation of the same series, Special  
6 Agent Mergen?

7 A. It is.

8 Q. So, at 1:25 p.m. what does Dean say to Adam?

9 A. Dean sends Adam an e-mail with the title of "Title." He  
10 says: Following up. Be patient.

11 Q. Two minutes earlier, at 1:23, what had happened?

12 A. Dean placed a call to Richard Runes.

13 Q. And this is a double asterisk so what does that mean?

14 A. Correct. It means we don't know whether or not they  
15 actually connected.

16 Q. Is that because you don't have Runes' tolls?

17 A. Yes.

18 Q. What happens at 3:50 p.m.?

19 A. Charles Dorego places a call to Rich Runes' cell phone.

20 Q. And what does Dorego do 10 minutes later?

21 A. Charles Dorego places a call to ALS, which stands for  
22 American land services.

23 Q. And Ms. Bustillo, if we can go to slide 17?

24 What date does this refer to?

25 A. January 10, 2013.

I755ske4

Mergen - direct

1 Q. What are the first two calls at the top?

2 A. It is Adam Skelos calling the PRI land line.

3 Q. What is the next entry from?

4 A. The next entry is from notes made by Christopher Curcio who  
5 is Adam Skelos' supervisor at PRI.

6 Q. What does Mr. Curcio's note say?

7 A. They say I call Adam on his cell phone and asked where he  
8 was. He said on appointments and again mentioned his  
9 arrangement between Anthony and his father regarding him  
10 working two days a week.

11 Q. We go down to 10:42 a.m. What happens there?

12 A. Dean Skelos calls Anthony Bonomo's cell phone.

13 Q. And the three lines above that call, what do those  
14 represent?

15 A. Adam makes two calls to Dean that went unanswered and then  
16 Dean calls back shortly thereafter.

17 Q. And then, so, at 10:42 Dean calls Anthony Bonomo's cell; is  
18 that right?

19 A. Correct.

20 Q. And do you see where it says next call next to that?

21 A. Yes.

22 Q. What does that mean?

23 A. It means it was the next call for Dean Skelos.

24 Q. As compared to the call that was listed right above that?

25 A. Right.

I755ske4

Mergen - cross

1 Q. And then what happens at 11:07 a.m.?

2 A. A PRI land line calls Dean Skelos.

3 Q. And how long was that call?

4 A. 21 minutes.

5 Q. And what is Dean Skelos' next call?

6 A. Dean Skelos then calls Adam Skelos.

7 MR. McKAY: No further questions, your Honor.

8 THE COURT: Ms. Angel?

9 CROSS EXAMINATION

10 BY MS. ANGEL:

11 Q. Good afternoon, Agent Mergen.

12 A. Good afternoon.

13 Q. My name is Alison Angel and I represent Adam Skelos, along  
14 with this back table here.

15 Now, you said on direct that the data you reviewed was  
16 from 2010 to 2015; is that correct?

17 A. Correct.

18 Q. And you will have to forgive my math but with 365 days in a  
19 year times five, I would say that's hundreds of days of data  
20 that you have reviewed; is that correct?

21 A. Well, we focused on particular days. I wouldn't say I  
22 reviewed every day within that five-year period.

23 Q. Okay. And you say when we focused on particular days, who  
24 is "we?"

25 A. It's myself and the prosecution team.

I755ske4

Mergen - cross

1 Q. And I notice that your chart also focuses on particular  
2 days; is that correct?

3 A. Correct.

4 Q. And there were about 17 pages so, again, I count that it is  
5 roughly about 17 days focused on in that chart?

6 A. More or less.

7 Q. Out of the full period from 2010 to 2015?

8 A. Correct.

9 Q. Who selected what dates should be focused on in that chart?

10 A. I believe it was the agent who initially created the  
11 charts, along with the prosecution team at the time.

12 Q. You believe or you know?

13 A. I know.

14 Q. You know. The agent that created the chart selected the  
15 dates in the chart?

16 A. Along with the prosecution team.

17 Q. Along with the prosecution team. Okay.

18 So, when you have a certain date in the chart, I  
19 noticed that there will be several calls from that date  
20 selected; is that true?

21 A. For some days, yes.

22 Q. For some days.

23 Are those all the calls that the people on that chart  
24 made that day?

25 A. Generally speaking, no.

I755ske4

Mergen - cross

1 Q. How did you decide which calls to include in the chart?

2 A. We tried to include calls that related to the e-mails and  
3 meetings on those particular dates.

4 Q. Isn't it true that the wiretap that had gone up on the  
5 defendant's phones in this case was not in place for any of the  
6 calls that are reflected in the chart?

7 A. No, that's incorrect.

8 Q. What part of that isn't correct?

9 A. I believe the final chart is from December 2014, and there  
10 is a call on that chart between Dean and Adam Skelos that was  
11 captured in the wiretap.

12 Q. Okay. I apologize then.

13 So, all of the calls except the one that you  
14 identified took place before the wiretap was up?

15 A. Correct.

16 Q. So, were you able to tell what the substance of those phone  
17 calls were?

18 A. From the toll records themselves, no, but multiple  
19 witnesses in this trial testified to the substance of many of  
20 the calls.

21 Q. But when you created the chart you were looking at the toll  
22 records; is that correct?

23 A. I didn't create the chart.

24 Q. When the chart was created it was based off of the toll  
25 records; is that correct?

I755ske4

Mergen - cross

1 A. I believe so, yes.

2 Q. And, do the toll records indicate what the substance of the  
3 phone calls that are in the chart were about?

4 A. The toll records themselves do not indicate content, no.

5 Q. So, when you tried to select phone calls that you believed  
6 were about the e-mails and dates that you had mentioned, how  
7 did you know which calls you were selecting?

8 MR. McKAY: Your Honor, the witness has testified that  
9 she did not create the charts in the first instance.

10 THE COURT: That's correct.

11 MS. ANGEL: Understood.

12 BY MS. ANGEL:

13 Q. Do you know if any of the calls that you included in the  
14 chart that were included in the chart, again, I acknowledge  
15 that you did not make it, do you know if any of those calls  
16 were personal calls between the two people on the calls?

17 A. I believe some witnesses testified that personal matters  
18 were discussed in some of the calls but, beyond that, I think  
19 they were relevant to the schemes in question.

20 Q. Well, a number of calls in the chart were between Dean and  
21 Adam Skelos; is that right?

22 A. Correct.

23 Q. Dean and Adam Skelos have not commented on the content of  
24 these calls that you have seen; is that correct?

25 A. Except for the one captured by the wiretap; that's correct.



I755ske4

Mergen - cross

1 Q. So, do you have any way of knowing what was discussed on  
2 the calls between Dean and Adam that occurred during the time  
3 when there was no wiretap in place?

4 A. I do not know what was discussed on those calls.

5 Q. Very well possible it could have been them discussing  
6 personal events, dinner plans, anything?

7 A. It is possible.

8 Q. And the information in the chart would not reflect that; is  
9 that correct?

10 A. No. The information in the chart does not reflect the  
11 content of those calls were not captured.

12 Q. It is limited to identifying who made the call and who  
13 picked up and, on occasion, how long the call was; is that  
14 correct?

15 A. Correct.

16 Q. Does the chart show all of the calls that are in evidence  
17 or that were discussed in this case?

18 A. No.

19 Q. In fact, you said you reviewed the underlying telephone  
20 records; is that correct?

21 A. Correct.

22 Q. So, for example, Government Exhibit 101, that would be Adam  
23 Skelos' phone records, correct?

24 A. I believe so, yes.

25 Q. And you reviewed that?

I755ske4

Mergen - cross

1 A. Yes.

2 Q. And, again, the exact number is escaping me but that was an  
3 over 500-page record; is that correct?

4 A. Yes, and I did not look at every phone call within the 500  
5 pages.

6 Q. Do you know how many calls between Dean and Adam Skelos  
7 occurred that are not reflected in the chart?

8 A. I do not.

9 Q. Do you know how many calls between Dean and Adam Skelos  
10 occurred in, say, 2012?

11 A. Total? No.

12 Q. 2013?

13 A. No.

14 Q. Do you know how frequently they spoke in 2012?

15 A. No.

16 Q. In 2013?

17 A. I do not.

18 Q. In any of the years that are reflected in the chart?

19 A. No.

20 Q. So, just for example, one of the dates in the chart that --  
21 sorry. Strike that.

22 One of the days in the chart is January 10th, 2013; is  
23 that correct?

24 A. Correct.

25 Q. And that date indicated that there were some calls between

I755ske4

Mergen - cross

1 Dean and Adam Skelos is that are noted in the chart; is that  
2 correct?

3 A. I believe so, but I don't have it in front of me.

4 Q. Do you know how many calls there were between Dean and Adam  
5 Skelos on, say, January 9th, 2013?

6 A. Offhand, no.

7 Q. On January 11th, 2013?

8 A. No.

9 Q. Do you know if Dean and Adam Skelos spoke more on January  
10 10th than they did on January 9th or January 11th, of 2013?

11 A. I don't know offhand, no.

12 Q. One moment here? (pause) There are also a number of  
13 e-mails reflected in this chart; is that correct?

14 A. Correct.

15 Q. And for the most part they're not full e-mails; is that  
16 right?

17 A. Some are, some are not.

18 Q. Several of the e-mails are just select quotes from a longer  
19 chain of e-mails; is that correct?

20 A. Correct.

21 Q. Who selected which quotes from the e-mails to use?

22 A. Again, the creator of the charts, along with the  
23 prosecution team.

24 Q. Along with the prosecution team?

25 A. Correct.

I755ske4

1 Q. Do you know how many e-mails between the parties whose  
2 names are reflected in your chart were omitted from the chart?

3 A. No.

4 Q. Do you know how frequently say, Dean and Adam emailed with  
5 each other on the days that are not reflected in your chart?

6 A. I do not offhand, no.

7 Q. Does this chart accurately summarize all of the evidence in  
8 the case?

9 MR. McKAY: Objection, your Honor.

10 BY MS. ANGEL:

11 Q. Sorry. Does this chart summarize all of the evidence in  
12 this case?

13 A. Not all of the evidence.

14 Q. Does this chart summarize the government's theory of the  
15 case?

16 MR. McKAY: Objection.

17 THE COURT: Sustained.

18 MS. ANGEL: No further questions.

19 MR GAGE: No questions, your Honor.

20 MR. McKAY: We have no redirect, your Honor.

21 THE COURT: Thank you very much. You may step down.

22 (Witness steps down)

23 MR. McKAY: Your Honor, the government rests.

24 THE COURT: Members of the jury, we are now going to  
25 turn to legal matters that we need to do. We can let you go

I755ske4

1 for the day and ask that you be back at 9:30 tomorrow morning.

2 Thank you. Have a good evening. Please, remember my  
3 admonitions.

4 (Continued on next page)

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(Jury not present)

THE COURT: Have a seat.

Ms. Shapiro said 15 to 20 minutes would be enough. Do you think that is enough?

MS. SHAPIRO: My only hesitation is my associate was on his way down and I think he should be here any minute. But, that should be fine.

We do just want to, before we do that, move under Rule 29 on behalf of Dean Skelos to dismiss the case on the grounds that the government has failed to establish the essential elements of each of the charged counts.

THE COURT: I have had, in mind, this motion all along, and I deny it. There is sufficient evidence.

MR. KENNEY: We move under Rule 29 on the same basis, your Honor.

THE COURT: I deny that as well. There is sufficient evidence.

Okay. We will be on a break then until, shall we say 1:20?

MR. McKAY: Thank you, your Honor.

THE COURT: Thank you.

MS. SHAPIRO: That's fine, your Honor. Can Dean Skelos -- he wants to waive his presence for the charge conference, is that all right?

THE COURT: Certainly.

I755ske4

1 MS. SHAPIRO: Thank you.

2 THE COURT: Does Adam Skelos?

3 MR. KENNEY: Could we make the same request, your

4 Honor?

5 THE COURT: Yes. I grant it.

6 See you at 1:20.

7 (recess)

8 (Continued next page)

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I75TSKE5

Charge Conference

1 THE COURT: Shall we begin at the beginning and go  
2 page by page?

3 MR. McKAY: Judge, we're happy to proceed however you  
4 would like. I'm sure the defense has a view about how best to  
5 to this. I guess what I would say is we have reviewed the  
6 draft you circulated last night, compared it to our draft.  
7 Obviously there are some changes that you made that the defense  
8 had requested that we disagree with, but we don't intend to  
9 revisit every single point and have arguments on every single  
10 point. We have I think about ten pages of -- or ten points  
11 that we would like to revisit, so we're happy to go to just  
12 those or go page by page, however the Court would like to.

13 THE COURT: I think it would be fine to go topic by  
14 topic the points you care about.

15 What do you think?

16 Who is speaking, Ms. Shapiro?

17 MS. SHAPIRO: I am, your Honor.

18 I think -- I actually think it would be better to go  
19 page by page, although there are obviously numerous pages that  
20 we don't have to raise with the Court, but I want to make sure  
21 that I don't miss anything. And I organized my notes based on  
22 pages, not by topics.

23 THE COURT: Let's go page by page.

24 MR. KENNEY: If I may make this comment for procedure,  
25 it will not surprise the Court that we worked together, the two



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Charge Conference

1 counsel teams. So Ms. Shapiro will take the lead and if we  
2 have anything to say, we may, but generally we'll probably rely  
3 on her comments.

4 THE COURT: Thank you.

5 Ms. Shapiro, where is your first edit?

6 MS. SHAPIRO: Page 14, and also there's a point at  
7 which my printout seems like it may be different, but I'm  
8 referring to sympathy. That was the first thing I had -- page  
9 where I had a comment.

10 THE COURT: If your page is different, maybe Alex  
11 could bring you my 14 sympathy. Does anyone have anything else  
12 on 14?

13 MS. SHAPIRO: I actually have a copy that we received  
14 from Alex, so I will use that.

15 So this was just a small point. So in the first  
16 paragraph, I guess second sentence, it says: You are to be  
17 guided solely by the evidence in the case, and the crucial  
18 question you must ask yourself is whether the guilt of each  
19 defendant has been proven beyond a reasonable doubt based on  
20 the evidence or lack of evidence at trial.

21 We would ask the Court to remove the phrase "based on  
22 the evidence or lack of evidence," move it up to right after  
23 where it says "ask yourselves." Because at least one of  
24 interpretation of it at the end is that it could be interpreted  
25 to suggest that guilt could be proved based on a lack of

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Charge Conference

1 evidence, so we just thought it would be better to put it right  
2 after "ask yourselves" at the beginning of the third line.

3 THE COURT: I added in "lack of evidence" because  
4 defense counsel often requests that. I would be happy to take  
5 it out if you think it's in any way confusing.

6 MS. SHAPIRO: I don't think it needs to be taken out.  
7 We thought it would be clearer if it came after "ask yourselves  
8 based on the evidence or lack of evidence whether the guilt of  
9 each defendant, blah, blah, blah. That's fine with me.

10 MR. McKAY: No objection.

11 THE COURT: So it will be you must ask yourselves,  
12 based on the evidence or the lack evidence at trial, whether  
13 the guilt of each defendant has been proven beyond a reasonable  
14 doubt.

15 MS. SHAPIRO: Thank you, your Honor.

16 THE COURT: I'll ask Ms. Shapiro her next one and then  
17 the government can tell me if they have something in between.

18 MS. SHAPIRO: The next one we have is on page 17,  
19 which is the end of the reasonable doubt instruction.

20 THE COURT: Right.

21 MS. SHAPIRO: So I assume the Court already took this  
22 into account, but we would request that the Court take out the  
23 last paragraph because it just seems to unbalance the  
24 instruction and emphasize that it's easier -- easy to find  
25 reasonable doubt.

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Charge Conference

1 THE COURT: I always include it, and I think it's  
2 helpful. I don't think it's inaccurate.

3 MS. SHAPIRO: Okay, your Honor. Thank you.

4 The next one I had was on page 19, punishment.

5 THE COURT: Okay.

6 MS. SHAPIRO: So we just object to the very last  
7 sentence because obviously the jury does need to be instructed  
8 that they can't consider punishment, and that if they find  
9 guilt that that's up to the Court, but we thought it was  
10 unnecessary and somewhat prejudicial to then go on to explain  
11 to the jury how the Court determines punishment, since the  
12 whole subject is supposed to be irrelevant. And so we would  
13 request that that last sentence be struck.

14 THE COURT: Well, it is irrelevant to the job they are  
15 doing, but they may be very concerned about how the job will be  
16 done by the judge. And so I think it is helpful to the jury to  
17 get this completely out of their mind to know that someone else  
18 is looking into things that they might be thinking about. I  
19 understand that it would be more pro-defendant if I took it  
20 out.

21 MS. SHAPIRO: Okay.

22 THE COURT: Your next one?

23 MS. SHAPIRO: So I just -- maybe I don't need to do  
24 this page by page, but I guess the next one I have is on page  
25 22 in the summary of the indictment. And the middle paragraph

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1 describing Counts Three, Four and Five uses the word "payment"  
2 in each case, and we would request that the Court use a more  
3 neutral word like maybe "benefits" or something like that,  
4 because -- obviously this came up during the testimony, there  
5 was some objections to whether, for example, salary could be  
6 characterized as a payment. And the government has its  
7 arguments to at least some of them, we have our arguments.

8 So that would be the request, that in those three  
9 places describing Counts Three, Four and Five, in this  
10 paragraph that the word "payments" be replaced by something  
11 like "benefits." And same would be true in the third paragraph  
12 which describes Counts Six, Seven and Eight.

13 MR. KENNEY: We would like to join in that, your  
14 Honor, and note that we made the point in our cross-examination  
15 that the money that came to Adam came from American Land and  
16 was presented from the beginning by Dorego as participating in  
17 insurance, and the documents reflect nothing to the contrary  
18 until American Land and Dwyer and Dorego start a communication  
19 by email as to how the money would be paid, and our client is  
20 not on these emails.

21 THE COURT: I think you're talking about the second  
22 sentence in the second paragraph on page 22.

23 MR. KENNEY: I'm talking about PRI.

24 THE COURT: Judge Caproni uses "something of value"  
25 often as a substitute.

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Charge Conference

1 MR. KENNEY: "Something of value" would be fine, but  
2 "payment from PRI is kind of a conclusion."

3 THE COURT: I agree.

4 MS. SHAPIRO: We're fine with that, too. So would the  
5 Court replace it in each of these places.

6 THE COURT: Yes. We have the word "payments" in the  
7 last three lines of the second paragraph on page 22. What  
8 about "property?" Do you want to leave the word in the first  
9 sentence of the paragraph "property?"

10 MS. SHAPIRO: Your Honor, I think that's fine because  
11 it's describing an allegation, and that's -- I think we're fine  
12 with that because that's what the crime is.

13 MR. McKAY: Your Honor, may I point out just this is a  
14 summary of the indictment. The indictment uses the word  
15 "payments." The defense is going to be able to argue that  
16 "payments" is not accurate description. In fact, it is. A  
17 salary is a payment. But if we're summarizing the indictment,  
18 I think we should use the word the indictment uses.

19 THE COURT: Well, I think that's uncontroversial.  
20 Perhaps we should.

21 MS. SHAPIRO: Well, I guess what I would say -- and  
22 part of the reason I proposed the substitute is that I think  
23 this would be a bit cumbersome, that even though this is a  
24 summary of the indictment, it doesn't say in each place  
25 "alleged payments." So it says Count Three relates to payments

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1 obtained from Glenwood Management, for example, and each of  
2 other sentences that we're talking about is phrased similarly,  
3 and I think as phrased it implies that there were payments.

4 MR. McKAY: We would be fine with "alleged payments."

5 MR. KENNEY: If I may, your Honor, that doesn't  
6 address the issue of --

7 THE COURT: How would -- I think I understand your  
8 point, Mr. Kenney. If we change "payment" to "something of  
9 value" --

10 MR. KENNEY: "Something of value" would be fine with  
11 us, your Honor.

12 THE COURT: I don't think that would be confusing to  
13 the jury. Does the government want to object any further?

14 MR. McKAY: Maybe you just say "things of value"  
15 rather than "something of value."

16 THE COURT: Yes, "things of value." We'll replace  
17 "payments" in the last three lines of the second paragraph on  
18 page 22.

19 MS. SHAPIRO: And the third paragraph as well, your  
20 Honor?

21 THE COURT: Yes. That would be the three places where  
22 "payments" appears in the last two sentences of page 22.

23 MS. SHAPIRO: Correct, your Honor.

24 The next thing I had --

25 MR. KENNEY: If I may on that, I'm looking at summary

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1 of the indictment, and I think paragraph --

2 THE COURT: We can't hear you.

3 MR. KENNEY: I said I think paragraph two has  
4 "payments" three times, and the last paragraph has "payments"  
5 several times. Is your Honor addressing both paragraphs?

6 THE COURT: They each have "payments" three times.

7 Ms. Shapiro, anything else?

8 MS. SHAPIRO: I was going to say I just want to make a  
9 comment with regard to page 23. So as the Court is aware, we  
10 preserved objections and briefing on the motions to dismiss.  
11 And I'll just relate this to the extortion as well as some  
12 similar issues that come up with other counsel so I don't have  
13 to repeat it, but we made arguments to preserve the argument  
14 that with respect to extortion that it shouldn't cover bribery.

15 Similarly, with respect to 666 we've argued it  
16 shouldn't cover gratuities, and with respect to the conspiracy  
17 to commit honest services fraud we've argued that it's  
18 unconstitutionally vague. I understand that the Court has  
19 applied law that is settled in this circuit, and in the case of  
20 honest services that it was decided in *Skilling* at least for  
21 now, so I'm not going to repeat all that, but I want to be  
22 clear that, to the extent we're discussing these instructions,  
23 we're preserving those objections.

24 THE COURT: That is noted.

25 The word "payments" appears on this page.

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Charge Conference

1 MS. SHAPIRO: Your Honor, that's a good point. I  
2 guess we would ask that the same changes be made wherever.

3 THE COURT: Things of value?

4 MS. SHAPIRO: Yeah. In all honesty, it says "alleged"  
5 here, but I guess we would prefer that it change, because I  
6 think it's better that way.

7 THE COURT: Okay. The government will tell me if you  
8 have you have anything in between.

9 MR. McKAY: Our first point is on page 23.

10 THE COURT: Okay.

11 MR. McKAY: So the defense had objected to the  
12 language that explains the difference between traditional  
13 extortion and extortion under color of official right. The  
14 Court had included part of our instruction, I think a reworded  
15 version of it, as the last sentence here on 23. We do think  
16 the Court should include the next sentence as well, which is  
17 that in the context of extortion under color of official right  
18 is the public official's misuse of his office to obtain money  
19 for himself or another person that supplies the element of  
20 coercion.

21 And the reason we ask for that is, first of all, that  
22 it's settled law, it comes straight out of -- I think *Margiotta*  
23 is the case. But most importantly, when a layman hears the  
24 term "extortion," they think about the concept of coercion.  
25 And so I understand the defense's objection to taking the place



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1 of pressure or threats, we're happy to leave out the pressure  
2 or threats part of it, but we do think the word "coercion"  
3 needs to be used because I think that is sort of a legal  
4 concept that might not be apparent to the average juror.

5 I would note this is particularly important because  
6 throughout the charge we had used the phrase "obtaining  
7 property under color of official right." The defense objected  
8 to that every time, and the Court I think granted most or all  
9 of those objections and struck out "obtaining property" and  
10 just wrote "extortion under color of official right."

11 The jury is going to hear the word "extortion,"  
12 "extortion," "extortion," which is a defined term with a  
13 particular meaning, so we ask that you just include the part  
14 about coercion in this last sentence.

15 THE COURT: I think that sounds reasonable. Any  
16 objection?

17 MS. SHAPIRO: Your Honor, we don't think that's  
18 necessary because the instruction goes on to explain each of  
19 the elements in detail and what's required, and it seems  
20 superfluous. So we would object to that.

21 THE COURT: "Misuse of his office" is broad.

22 MR. McKAY: Your Honor, "misuse of his office" does  
23 come directly as a quote from *Margiotta*, but understanding that  
24 the defense will argue that that's intention with official  
25 action, we don't need the phrase "misuse of his office." The

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1 key part is that it is the official power or the ability to  
2 take official action, that is what supplies the element of  
3 coercion. That's the concept that we think has to be  
4 communicated to the jury.

5 THE COURT: Okay. Is there any objection on that from  
6 the defense before we move on?

7 MS. SHAPIRO: Sorry, can you just tell me again what  
8 language you're adding?

9 MR. McKAY: I suppose I would just take a direct quote  
10 from *Margiotta*, which is as follows -- and we could modify the  
11 misuse part after I'm done, but it is, "The public officer's  
12 misuse of his office supplies the necessary element of  
13 coercion, and the wrongful use of official power need not be  
14 accompanied by actual or threatened force, violence or fear."

15 Now that's the direct quote from *Margiotta*.

16 MS. SHAPIRO: Your Honor, with all due respect --

17 THE COURT: He's not finished.

18 MS. SHAPIRO: I'm sorry.

19 MR. McKAY: I was going to say instead of saying  
20 misuse of his office, we could just adopt what they have in the  
21 second portion of that sentence, which is the public officer's  
22 official power supplies the necessary element of coercion. We  
23 think that would satisfy that concern.

24 THE COURT: I think that's quite neutral.

25 MS. SHAPIRO: Your Honor, I disagree, and I think that

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1 part of the problem here is that the particular elements  
2 that -- it may well be that sentence is in the *Margiotta* case,  
3 but there's lots of reasoning in cases that doesn't need to be  
4 conveyed the jury, and the jury needs to know what the elements  
5 are and how to understand how to apply them. And I think  
6 that's just going to confuse them because it's not  
7 specifically -- they need to follow the later instructions that  
8 specifically define each element, and this misuse concept is  
9 unduly vague, particularly in light of the *McDonnell* case and  
10 it's going to create confusion.

11 THE COURT: I would like to hear the exact text of it  
12 as you proposed it to the Court.

13 MR. McKAY: The public -- well, let me start it by  
14 saying in the context of extortion under color of official  
15 right, it is the public officer's official power that supplies  
16 the necessary element of coercion, and the wrongful use of  
17 official power need not be accompanied by actual or threatened  
18 force, violence or fear.

19 And I can give the Court the cite for this as well,  
20 which is 688 F.2d 130-131, and I directly quoted that except  
21 the misuse of his office to reflect the defense's objection to  
22 that.

23 THE COURT: Okay.

24 MS. SHAPIRO: Your Honor, we think that it's  
25 prejudicial and confusing to start talking about coercion and

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1 how it's -- well, it's not really necessary because here it's  
2 just supplied by the status of the defendant's office. And I  
3 do think it's completely unnecessary, because what the jury is  
4 supposed to do, as I indicated earlier, is apply the actual  
5 instructions that relate to particular elements.

6 THE COURT: I think that the government's proposed  
7 addition will be helpful to the jury, so I will take it over  
8 objection.

9 Your next point, Ms. Shapiro?

10 MS. SHAPIRO: It's page 27. I don't know if the  
11 government has anything before that.

12 MR. McKAY: We have something on the same page, so  
13 they can go first if they would like.

14 MS. SHAPIRO: I'm sure it comes as no surprise to  
15 Court, and I'm sure the Court thought about this carefully,  
16 that we object to the "as opportunities arise language"  
17 wherever it appears in the charge. I will note it later, but  
18 here it appears twice on this page, once at the end of the  
19 second paragraph and once in the third line of the third  
20 paragraph.

21 And we briefed this extensively. I will just note for  
22 the record, for example, in our motion to dismiss, docket  
23 number 248 at 14 to 20, at the reply on the motion to dismiss,  
24 docket number 295 at pages 9 to 12, as well as in the two sets  
25 of objections we filed and our July 1st, 2018 letter. I think

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1 we briefed this extensively. I know the government responded  
2 and I'm sure the Court has thought about it, so I won't belabor  
3 the record, but I do want to highlight one thing, because I do  
4 think that -- just so it's entirely clear that our argument is  
5 a little bit different than the arguments that some defendants  
6 who have raised these objections in district courts have made,  
7 which is to say that our focus is on the matter, and we're not  
8 arguing that a specific decision on that matter has to be  
9 identified, we're simply arguing that the specific matter has  
10 to be identified, and that's the problem with the "as  
11 opportunities arise" language.

12 THE COURT: How would you define "matter" there?

13 MS. SHAPIRO: Well, let me see if I can --

14 THE COURT: It seems much broader.

15 MS. SHAPIRO: No, we would define matter the way  
16 *McDonnell* does.

17 THE COURT: Which is?

18 MS. SHAPIRO: Give me a moment.

19 If you look at docket 385, which is our most recent  
20 red line, which we filed on Tuesday, on page 36 -- and I guess  
21 this will come up when we get to the official action  
22 definition, but we -- so actually -- sorry, 37.

23 The way we propose it there, and we think this is  
24 entirely consistent and mostly quoting the *McDonnell* opinion,  
25 that what *McDonnell* says is that the matter has to involve a

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1 formal exercise of governmental power that is similar in nature  
2 to a lawsuit before a court, a determination before an agency  
3 or a hearing before a committee. It must be specific, focused  
4 and concrete, the kind of thing that could be put on an agenda  
5 and checked off as complete. It cannot be a broad policy  
6 objective like economic development or tax reform.

7 So the point being that --

8 THE COURT: The wording you're suggesting is on page  
9 30 of these instructions.

10 MS. SHAPIRO: I guess, just to be clear, I was just  
11 clarifying why we object to the "as opportunities arise"  
12 language that's on page 27, that we think it's too vague and  
13 too broad because it could apply to anything that might come up  
14 later that somebody could later say fit the definition under  
15 *McDonnell* of an official action. But what we're saying is that  
16 for all the reasons that we briefed extensively that the  
17 *McDonnell* opinion requires greater specificity. So that's why  
18 we object to the whole concept of "as opportunities arise."

19 THE COURT: I'm not sure whether it's me or you who is  
20 conflating "action" with "opportunity." The actions are  
21 defined just as you think they should be on page 30, official  
22 action.

23 MS. SHAPIRO: Maybe I'm not being clear, your Honor.  
24 Maybe Mr. Thayamballi can supplement what I said and make it a  
25 little clearer.

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1 MR. THAYAMBALLI: Your Honor, you're correct that in  
2 your definition of official action you describe in certain  
3 parts the matter component and the action component which are  
4 about the two parts that are described in *McDonnell*.

5 Our point is that our whole objection to the "as  
6 opportunities arise" theory that's been advanced by the  
7 government is that a faithful reading of *McDonnell* will show  
8 that the matter that is the matter component of the official  
9 action must be agreed to at the time of the quid pro quo. And  
10 so it's different from the argument that other defendants have  
11 made, and certainly the cases cited by the government, which is  
12 that the entire official action, the matter and the action on  
13 that matter, have to be specified in advance. And we  
14 understand that that's not a reasonable interpretation.

15 THE COURT: That your own is not reasonable?

16 MR. THAYAMBALLI: No, that the other argument that  
17 we're disclaiming is not reasonable.

18 THE COURT: I see. Well, I disagree with your view of  
19 the law here.

20 MR. THAYAMBALLI: We understand, your Honor.

21 THE COURT: I take your objection.

22 MS. SHAPIRO: Okay.

23 THE COURT: Next page?

24 MR. McKAY: Your Honor, we have two small points on  
25 that page, if we could.

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1 THE COURT: Yes.

2 MR. McKAY: Consistent with what we just been  
3 discussing, if you look at the third full paragraph, which  
4 begins, "The government must prove."

5 THE COURT: Yes.

6 MR. McKAY: The last sentence of that paragraph lacks  
7 the "as opportunities arise" language, and since it's breaking  
8 down a different part of the intent element, it's now focusing  
9 on the payor's intent --

10 THE COURT: We would add comma at the end, as  
11 opportunities arise?

12 MR. McKAY: I think the proper place for it would be  
13 the second to last line of that paragraph begins, "Benefit of  
14 that party," I would add "as opportunities arise" there, "and  
15 that Dean Skelos," and it goes on.

16 THE COURT: All right.

17 MR. KENNEY: If I might make a point on that, your  
18 Honor, it may be an overemphasis, and it seems so to me, that  
19 paragraph one ends "as opportunities arise," paragraph two ends  
20 "as opportunities arise," paragraph three, the end of the first  
21 sentence reads "opportunities arose," and now that same  
22 paragraph will have the same phrase again. I was thinking  
23 three is a lot.

24 THE COURT: I understand. I think it's a difficult  
25 concept and it belongs in each place where it now is.



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1           You had another point on this page?

2           MR. McKAY: We did, your Honor, and this is a point  
3 that recurs I think at least three times in the charges, but I  
4 will raise is once now, and that is the good will instruction.  
5 So as the Court will recall most likely from the first trial,  
6 there's a lot of back and forth over the good will instruction.  
7 Last time we ultimately agreed upon with the defense including  
8 the language that we had proposed. We're fine with that  
9 language.

10          THE COURT: What is that language?

11          MR. McKAY: It is the first sentence of this paragraph  
12 at the bottom of 27, "If either the person giving the property  
13 or Dean Skelos," that language, but what follows, the next two  
14 sentences, are directives as to what is not a crime.

15          THE COURT: Right.

16          MR. McKAY: And our concern with those is twofold.  
17 The first is that they're largely redundant of what has just  
18 been said, that the property was given solely to cultivate good  
19 will or nurture a relationship. The next sentence says a  
20 general attempt to curry favor. We think it's largely saying  
21 the same thing twice.

22          And second, to say something is not a crime, first of  
23 all, that's typically not the way jury instructions are phrased  
24 in terms of a directive as to what is not unlawful. It may  
25 well -- I'm not saying we're charging this crime, but it may

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1 well be a state crime or some kind of gratuities violation,  
2 what is being described, so that is probably not entirely  
3 accurate. But the general point here is that the first  
4 sentence about good will and nurturing a relationship more than  
5 adequately cover the concept, and so to repeatedly rephrase it  
6 in several different ways we think is unnecessary, and so we  
7 would object to those next two sentences.

8 MS. SHAPIRO: May I respond?

9 THE COURT: Yes.

10 MS. SHAPIRO: We disagree, and I think it's critically  
11 important that the instructions be balanced, and there are many  
12 places in the charge, and I will raise some for later but I'm  
13 sure I won't raise all of them, where the charge goes on and on  
14 to talk about how easy it is prove the crime in some ways that  
15 are quite repetitive. So this is absolutely critical to  
16 defense, your Honor, and we have been thinking about proposing  
17 a theory of defense charge but I think we probably will not if  
18 it's adequately covered in the charge. And we think it's very  
19 important that the jury understand this concept, it's just  
20 central to the arguments we're going to be making in summation.

21 And it is correct as phrased, and I don't think the  
22 government has pointed to any authority suggesting otherwise.  
23 And indeed, if there were a state crime along the lines that  
24 Mr. McKay described, I submit it's pretty obvious, based on the  
25 reasoning in the *McDonnell* case, that the Supreme Court would

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1 find that to be unconstitutional. So we think it's very  
2 important to keep this in, and we would request that the Court  
3 leave the language as it is in your draft charge, your Honor.

4 THE COURT: I understand both points, that is, that  
5 the first sentence really encompasses what follows. But I  
6 think that what follows is helpful to the jury as they try to  
7 figure out what is lawful and what is not. So I would keep  
8 that.

9 MS. SHAPIRO: Thank you, your Honor.

10 We had, I think, one other thing on this page. At the  
11 end of the third paragraph we had proposed in our requests or  
12 recent objections, rather, which is docket 385-1 on page 31,  
13 just to end this paragraph with an additional sentence: In  
14 other words, there must be an agreement, explicit or implicit,  
15 to trade official acts for payment. And we ask that be  
16 included. I think it's a correct statement of the law. We  
17 cited *McDonnell*, the *Silver* case in the Second Circuit as well  
18 as --

19 THE COURT: If I may interrupt, it's redundant of  
20 paragraph two, the second sentence.

21 MS. SHAPIRO: Well, your Honor, we think it's  
22 important for clarification to the end of this third paragraph.

23 THE COURT: Let me just read it from the screen.

24 It's not clear from the realtime, so could you read it  
25 one more time?

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1 MS. SHAPIRO: The proposal would be to add the  
2 following sentence: In other words, there must be an  
3 agreement, explicit or implicit, to trade official acts for  
4 payment. And this was on page 31 of our filing on Tuesday.

5 THE COURT: Yes?

6 MR. McKAY: I'm happy to respond. We agree that it is  
7 redundant of what has gone before. If the court were to  
8 include it, we would have a number of changes that would need  
9 to be made.

10 THE COURT: I don't think I should include it. I  
11 think the point has been made, that it's redundant.

12 MR. KENNEY: Your Honor, I hope I'm not out of sync  
13 here, I'm looking at your draft that's been circulated and I  
14 note that on page 28, on paragraph -- the bottom paragraph uses  
15 the word "payor" three times. I wonder if that shouldn't be  
16 changed.

17 THE COURT: "Payors" changed to?

18 MR. GAGE: "Giver" since we said "a thing."

19 THE COURT: Has anyone thought of a better word?

20 MR. McKAY: Your Honor, we think "payor" is the  
21 correct word, but -- I still don't understand the objection to  
22 "payment," but if you would like to change it to "giver," I  
23 think this probably isn't --

24 I actually think the way we proposed this in some of  
25 the places is "victim," and it is an extortion charge. So

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1 "giver" has a bit of a different connotation then. The fact of  
2 the matter is that all of these schemes involved payment to  
3 Adam Skelos; whether you want to call it a salary, whatever,  
4 that is a payment. And so the person who is making that  
5 payment is a payor.

6 THE COURT: I cannot think of anything better than  
7 payor.

8 MR. KENNEY: It may be, your Honor, I withdraw that,  
9 because I don't think it's confusing, I think it's later, so I  
10 withdraw my request.

11 MS. SHAPIRO: Your Honor, I had a couple of other  
12 comments on this page. At the end of the first full paragraph  
13 that starts "Again," we had proposed that it be balanced with a  
14 sentence that says, "The in exchange for requirement is not  
15 satisfied simply because the thing of value is followed by an  
16 official act, the thing of value must be given to procure the  
17 official act." And we cited authorities, including the recent  
18 *Percoco* instructions in both sets of our objections to that  
19 effect.

20 THE COURT: Does the government have a view?

21 MR. McKAY: We do. We think it's, A, unnecessary,  
22 because we have now described quid pro quo several times, and  
23 it's also inaccurate because the timing can differ. It doesn't  
24 have to be payment then vote or vote then payment, it could be  
25 either way. So the sentence is both we think unnecessary and

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1 inaccurate.

2 THE COURT: I do think it's unnecessary. Let's move  
3 on.

4 MS. SHAPIRO: Okay, your Honor, we preserve that  
5 objection for the reasons set forth in our filings.

6 One moment, your Honor.

7 (Pause)

8 MS. SHAPIRO: Your Honor, in the next paragraph, the  
9 one that starts "This element," in the last sentence, "Thus if  
10 you find that the transfer of property was for entirely  
11 innocent reasons stemming from friendship or any other innocent  
12 reason," we feel like "entirely innocent" is a bit too strong  
13 and would suggest something like "for other reasons," and then  
14 leaving "stemming from friendship or any other innocent  
15 reason," rather than that phrase "entirely innocent."

16 THE COURT: I agree.

17 MR. MCKAY: Well, your Honor, the phrase "entirely" is  
18 critical because the law is clear that it doesn't have to be  
19 the sole motive for something. So if we change it to just "for  
20 other reasons," that would be an incorrect statement of the  
21 law. If you find that the transfer of property was for  
22 entirely different reasons perhaps would be a better statement  
23 of law, but the "entirely" is key because this is a sole versus  
24 partial motivation question.

25 MS. SHAPIRO: I think that's fine, your Honor.

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1 THE COURT: So the only change we'll make on page 28,  
2 second full paragraph, is to change the word "innocent" to  
3 "different."

4 MS. SHAPIRO: And your Honor, it appears -- I  
5 neglected to mention this, it appears twice in the paragraph,  
6 there's a couple of lines above the one I read, so if we could  
7 say "entirely different."

8 THE COURT: Okay.

9 MS. SHAPIRO: In the last paragraph on page 28 the  
10 sentence that says, "The official action can either be actually  
11 performing an act himself or exerting influence over an  
12 official act performed by another official," I think this is a  
13 little confusing here because this is -- this relates to the  
14 definition of official action, not the quid pro quo  
15 requirement. And, of course, the definition of official action  
16 is explained in detail later. And in addition, obviously  
17 exerting influence isn't enough under *McDonnell* anyway, because  
18 the defendant has to advise or pressure the other official. So  
19 we would just ask that this sentence be stricken from this part  
20 of the charge.

21 THE COURT: Is there any objection?

22 MR. McKAY: Your Honor, we're fine with that.

23 THE COURT: Okay. We're striking the words "the  
24 official action can either by actually performing an act  
25 himself or exerting influence over an official act performed by

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1 another public official."

2 Next.

3 MS. SHAPIRO: The next issues we had were on page 30,  
4 the definition of official action. So --

5 MR. McKAY: I had assumed there would be no objection  
6 to this, your Honor.

7 MS. SHAPIRO: There's always an objection.

8 So your Honor, I think there's a couple of points.  
9 Number one, we think that the instruction does not as clearly  
10 set forth the precise test in *McDonnell* as the proposal that we  
11 had which was in our most recent set of objections, docket  
12 number 385 at 36 to 39, which we talked about a little bit in  
13 the letter we submitted on July 1st. But we think that the  
14 proposal more clearly set out the two-part test in *McDonnell*,  
15 and so we would request that the Court give that instruction  
16 rather than this one.

17 And then a couple of specific points with respect to  
18 the draft, the Court's draft instruction, the second to last  
19 paragraph where it says -- where it has some examples, we think  
20 the example of approving regulatory action is kind of vague as  
21 an example, and we would propose changing that to ordering  
22 regulatory action.

23 And more generally, we think the Court's definition  
24 doesn't clearly explain why something like setting up meetings  
25 doesn't qualify as a decision or action on the question or



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1 matter, and that the examples given in *McDonnell* make clear  
2 that the public official has to actually decide the question or  
3 matter or pressure or advise another official to do so.

4 So that's the nature of the objection.

5 MR. MCKAY: Judge, as far as I can tell, both parties  
6 have proposed substantially the same language, it's just the  
7 order is flipped. I think the way that we proposed and the  
8 Court has drafted is clearer, so I would be inclined to stick  
9 with that language. The phrase "approving regulatory action"  
10 versus "ordering regulatory action" doesn't really make a  
11 difference to us.

12 THE COURT: Well, then I will change it to "ordering."

13 MS. SHAPIRO: Thank you, your Honor.

14 THE COURT: But I will keep the language otherwise  
15 here.

16 MS. SHAPIRO: Your Honor, the next thing I had was  
17 just on 33, the attempt charge. It seems to me, given the  
18 evidence in the case, that I'm not sure this is relevant that  
19 government has some theory of attempt. It appears they're  
20 arguing that crimes were conflated. So we don't think it's  
21 necessary. I don't think there's anything legally incorrect  
22 about the instruction, but we would -- we're concerned that it  
23 might be confusing given the nature of the evidence in the  
24 case.

25 MR. MCKAY: Your Honor, we're permitted to charge and

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1 argue both theories, and in fact there is a good basis for both  
2 theories. The best example is probably AbTech. The defense  
3 has vigorously argued in cross-examination, and I'm sure they  
4 will in closing, that no official action was ever taken so no  
5 extortion ever took place. So we do think that there's a clear  
6 attempt theory in this case, and we think we're entitled to the  
7 instruction.

8 THE COURT: All right. I will keep it.

9 MS. SHAPIRO: Your Honor, I realized I missed one  
10 thing on the page before that, page 32. Since the interstate  
11 commerce element is the last element of Counts Three through  
12 Five, we would just ask that the Court add an instruction  
13 consistent with the one that ends, "The last element for all  
14 the other counts," which is along the lines of "if you find  
15 that all of the required elements of extortion under color of  
16 official right have been proven beyond a reasonable doubt, then  
17 you must find Dean Skelos guilty of that charge. On the other  
18 hand, if you find any element has not been proven beyond a  
19 reasonable doubt then you must find Dean Skelos not guilty of  
20 that charge."

21 THE COURT: And you would be adding that to the end of  
22 which paragraph?

23 MS. SHAPIRO: To the end of paragraph 32.

24 THE COURT: At the very end?

25 MS. SHAPIRO: That's consistent with the way the Court

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1 has done it with respect to other instructions.

2 MR. McKAY: Your Honor, we think that's unnecessary.  
3 You've quite clearly instructed the jury already that they need  
4 to find each element beyond a reasonable doubt. The first  
5 sentence of every single element says the government must prove  
6 beyond a reasonable doubt. At this point we're just adding  
7 more and more words for the jury to sit through and listen to  
8 that don't say anything new. And so I think Ms. Shapiro is  
9 right that this is included at the end of some counts but not  
10 all counts. We agree it should be consistent, but our view is  
11 that this paragraph is unnecessary at the end of any count  
12 since the Court has quite clearly set forth the reasonable  
13 doubt requirement.

14 THE COURT: So you're suggesting omitting the last  
15 paragraph?

16 MR. McKAY: You have omitted it here.

17 THE COURT: Yes.

18 MR. McKAY: I think in honest services you included  
19 it. We would have omitted it there.

20 THE COURT: So you would omit it here and honest  
21 services?

22 MR. McKAY: Yes, your Honor.

23 THE COURT: I think that's reasonable.

24 MS. SHAPIRO: Your Honor, it's quite standard language  
25 that comes at the end of the last element of particular

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1 statutes that is standard in most charges. I think that's why  
2 it was -- the Court had it at the end of the other charge.

3 THE COURT: But it's in the first line of this charge  
4 on 32.

5 MR. McKAY: Just to be clear, your Honor, I was  
6 referring back not only to that but also if you go back to page  
7 24, you begin by saying, "In order to sustain the charge, the  
8 government must prove beyond a reasonable doubt the following  
9 four elements." You then list them, and the first sentence of  
10 every single element you say "beyond a reasonable doubt."

11 With respect to the notion this is standard, it was  
12 not in the Court's charge from the last trial, and it's been  
13 included in some places because it was a defense proposal, but  
14 I don't think it's all that common. I think it's common to  
15 state at the outset that you must consider all the elements.

16 MS. SHAPIRO: Well, your Honor, I think it's important  
17 to keep the charge balanced. It was in all the *Percoca*  
18 instructions. The government isn't arguing that there's  
19 anything legally incorrect, nor could it. So we would  
20 certainly object to it being taken out of the places it already  
21 is. And we think it should be at the end of each description  
22 of the different substantive charges.

23 THE COURT: I don't think it's needed on page 32 where  
24 line one speaks of beyond a reasonable doubt.

25 The next point.

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1 MS. SHAPIRO: Your Honor, we would reiterate the  
2 objections that we previously made, and this applies to a  
3 number of the Court's instructions, but the first time I think  
4 this comes up is on page 35 and 36 with respect to the elements  
5 of agreement in the Count One conspiracy, and that is the  
6 following: There's, of course, the standard lengthy and  
7 detailed circumstantial evidence charge earlier in the charge,  
8 and yet nonetheless, in numerous places here and that follow,  
9 there's additional language about circumstantial evidence which  
10 we respectfully submit is unnecessary and unbalanced.

11 THE COURT: Let me say that I reviewed in each  
12 instance whether I thought it was helpful to the jury. I think  
13 it's helpful to repeat it with respect to reading someone  
14 else's mind because it's such a foreign concept to a juror. I  
15 think that in a legal proceeding they should do that.

16 MS. SHAPIRO: Well, I understand, your Honor, I just  
17 think that it's unnecessary. And if you read this entire  
18 instruction, it's extremely unbalanced. And in fact, most of  
19 the language is about sort of how easy it is to infer such an  
20 agreement. And so we submit that it's not necessary, and we  
21 object to repeating it here, and I will make the same objection  
22 in other places.

23 THE COURT: Could you point me to the specific  
24 paragraph?

25 MS. SHAPIRO: Sure, your Honor.

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1 THE COURT: Paragraph three?

2 MS. SHAPIRO: The easiest point -- well, just a  
3 moment, your Honor.

4 (Pause)

5 MS. SHAPIRO: So we proposed -- I mean obviously the  
6 Court rejected it, but we proposed the Judge Caproni  
7 formulation because we thought it was simpler and more  
8 straightforward, but the specific language I'm talking about  
9 includes -- sorry, I'm trying to look at the red line and  
10 compare it -- try to see where it is.

11 In the paragraph that starts "It is sufficient," at  
12 the bottom of page 35, the second sentence -- yeah, the second  
13 sentence that says "express language or specific words are not  
14 required to indicate assent or attachment to a conspiracy, nor  
15 is it required that you find any particular number of alleged  
16 co-conspirators joined in the conspiracy," that's one example.

17 THE COURT: I didn't follow along with you. What  
18 paragraph?

19 MS. SHAPIRO: Sorry, this is -- it's at the very  
20 bottom of page marked -- the paragraph that -- actually before  
21 I get to that there's one other thing. So in the paragraph  
22 above of that, the one on page 35 that starts "To establish a  
23 conspiracy" --

24 THE COURT: Yes.

25 MS. SHAPIRO: -- about five or six lines down it

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1 says -- after explaining using the standard language that  
2 people don't need to sit around a table and enter into a solemn  
3 compact and so forth, there's a sentence that says, "Indeed, it  
4 would be extraordinary if there were such a formal document or  
5 specific oral agreement." We would ask that that specific  
6 sentence be struck.

7 It then goes on to explain that much is left to  
8 unexpressed understanding, which I understand the Court thinks  
9 is an important concept to elaborate on.

10 And then in addition to that, at the bottom of the  
11 page, the last line, the sentence that starts "Express  
12 language," we had asked the Court to strike that sentence and  
13 the next one.

14 And then just to illustrate -- I mean I understand the  
15 Court is inclined to leave a lot of this, but just to  
16 illustrate why we think it's unbalanced, the instruction then  
17 goes on later on page 36 -- sorry, your Honor, I'm trying to  
18 track what was taken out.

19 (Continued on next page)  
20  
21  
22  
23  
24  
25

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1 THE COURT: That's okay.

2 MS. SHAPIRO: I mean, I guess what I would say is I  
3 understand the Court struck out some of the language we  
4 objected to but it goes on and it really goes on and on for  
5 multiple paragraphs explaining the government's perspective, if  
6 you will, on this. So, we think it would be more balanced if  
7 it was shorter and didn't include as much language such as the  
8 two sentences I focused the Court on earlier. I just think it  
9 is unbalanced.

10 MR. BROD: Your Honor, if we could supplement the  
11 point that Ms. Shapiro is making? On page 35, middle of the  
12 paragraph, there is a sentence following the "it would be  
13 extraordinary" which Ms. Shapiro has objected to. The Court  
14 says: When people agree to enter into a criminal conspiracy,  
15 much is left to unexpressed understanding.

16 In our view it would be more balanced for the Court to  
17 stick to, in a sense, the dry legal concept which is that a  
18 conspiracy may be proven by showing only the unexpressed  
19 understanding of the parties rather than the sort of more  
20 general observation which tend to imply in the Court's  
21 experience people can enter into a conspiracy which, in our  
22 view, tends to imply that the people at the table here may --  
23 and I know that's not what the Court would be saying, but "when  
24 people enter into a conspiracy" language invites a conclusion  
25 about experience rather than law and I think we would prefer



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1 something slightly dryer.

2 THE COURT: I understand. I think conspiracy is very  
3 hard for jurors to understand and that it warrants a long  
4 explanation so I am inclined to leave it as it is.

5 MS. SHAPIRO: Thank you, your Honor.

6 So, the next thing we have is on the membership  
7 element.

8 THE COURT: 37.

9 MS. SHAPIRO: Yes. I need to switch to the other  
10 document because at this point my pages change.

11 THE COURT: Take your time. I know it is hard.

12 MS. SHAPIRO: Yes, page 37.

13 So, I guess a couple things. One of the reasons we  
14 proposed the shorter instruction that Judge Caproni gave here  
15 is because we think it is more balanced but the Court,  
16 obviously, has opted for the longer version and we think that  
17 there are a couple problems with it in terms of the balance.  
18 One is, again, I believe that the Court goes on, at some  
19 length, to discuss circumstantial evidence and this is not only  
20 after the main circumstantial evidence instruction but also  
21 after having the previous instruction that we were just  
22 discussing. And at the same time, and I don't know if this was  
23 in our objections, we may not have caught it earlier but the  
24 concept, although it is alluded to here and there that the  
25 defendant has to intend to join the agreement knowing of its

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1 unlawful aims, we feel like it is not adequately explained and,  
2 among other things, and this is consistent with the language of  
3 the indictment, there is typically an instruction that talks  
4 about knowingly, willfully, and intentionally and willfully is  
5 not in here. So, our first choice actually would be if the  
6 Court could make some changes to add some specific language  
7 that's in Sand along those lines and I can propose it or, at a  
8 minimum, to strike some of the repetitive circumstantial  
9 evidence language but --

10 THE COURT: I think I want to keep the circumstantial  
11 evidence point but I want to hear you on that.

12 MS. SHAPIRO: Thank you, your Honor.

13 THE COURT: Isn't willfully included in the concepts  
14 of intentionally and knowingly?

15 MS. SHAPIRO: Well, your Honor, I think it is fairly  
16 standard to include it as a separate -- well, maybe I could  
17 just propose the language and the Court can think about it.

18 So, the first, it is just in two places that we would  
19 propose and, again, this is taken from Sand instruction 19-6.  
20 So, at the end of the second paragraph -- sorry -- in the  
21 second paragraph on page 37 at the end of the first sentence,  
22 so after the phrase, "awareness of the generally unlawful  
23 nature of his acts," we would propose adding the following  
24 language: And the specific intention of furthering its illegal  
25 objective.

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1           And then there is one other place where we would  
2     propose adding some language on this page. So the other one  
3     would be a little further down the page after the penultimate  
4     paragraph right before the one that starts "now," we would  
5     propose adding a paragraph that, again, is contained in that  
6     same Sand instruction and adapt it from the honest services  
7     fraud conspiracy instructions, it says: The defendant must  
8     have acted willfully, meaning with an intent to do something  
9     that the law forbids, that is to say with bad purpose either to  
10    disobey or disregard the law.

11           THE COURT: I think that's standard.

12           Does the government object?

13           MR. McKAY: Well so, your Honor, first of all, despite  
14    having about five different red lines of this document, this is  
15    the first we are hearing of this so it is a little difficult to  
16    agree on the fly. But, as I recall from the first trial, and I  
17    am looking at our instructions now, we did not have willfully  
18    in the extortion conspiracy, we did have it in the honest  
19    services conspiracy and that's because they're two different  
20    conspiracy statutes. You will note that when we get to the  
21    honest services instruction here we do have willfully included  
22    and I think the distinction for that, as I recall, is by virtue  
23    of statute but I'm --

24           MS. SHAPIRO: Your Honor, just to be clear, and I know  
25    the Court is aware of this but I wasn't involved at all in the

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1 first trial and I apologize that, you know, that I am just  
2 bringing this to the Court's attention now.

3 THE COURT: It is not a problem.

4 MS. SHAPIRO: It just occurred to me when I was  
5 reeding the draft but "willfully," there is nothing in the  
6 extortion statute that is different in this regard but  
7 "willfully," the notion of "willfully," the notion that the  
8 defendant has to understand that the conspiracy has a purpose  
9 to disobey or disregard the law is true in all conspiracy  
10 statutes. That's the *mens rea* for conspiracy and for  
11 intentionally joining a conspiracy, the second element, and it  
12 doesn't change with regard to the type of conspiracy. I am not  
13 aware of any case that would suggest that.

14 MR. McKAY: Your Honor, just two points.

15 The first is that if the concern is that the *mens rea*  
16 include knowledge of its unlawful purpose and in furtherance of  
17 the unlawful object, that sentence appears exactly one  
18 paragraph above what Ms. Shapiro is now trying to edit so that  
19 *mens rea* is fairly included.

20 We are happy to take whatever suggestions she has  
21 under advisement and look into whether there is some case law  
22 supporting what she is saying but it is a little bit hard when  
23 this is the first time we are hearing of this despite all these  
24 different red lines we have done back and forth.

25 THE COURT: I am not clear on how "willfully" differs

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1 from an act that is done deliberately and purposefully.

2 MS. SHAPIRO: Well, your Honor, it is quite different  
3 in the following sense.

4 So, the intentionally point is that the defendant knew  
5 what he was doing, if you will, that it wasn't a mistake and he  
6 didn't realize he was doing it, whereas the point of willfully  
7 in this particular context is that the defendant has to have  
8 understood that the purpose of the conspiracy was to do  
9 something the law forbids. And so, I think intentionally is  
10 slightly different, it is like an absence of mistake and it  
11 doesn't necessarily require any showing of consciousness that  
12 the purpose is something that's illegal. That's the  
13 distinction. And I think it is very important in this  
14 particular case, especially given we had testimony about ethics  
15 training and so forth, and on the particular facts of this case  
16 obviously the defense is that there wasn't a corrupt intent,  
17 there wasn't an intent to do something that the law  
18 specifically forbids and it is absolutely crucial to the  
19 defense.

20 THE COURT: So you want to get in, I take it, the  
21 concept of you are doing it with knowledge that the law forbids  
22 it.

23 MS. SHAPIRO: Correct, your Honor. That you are  
24 joining the conspiracy understanding that its purpose is to  
25 break the law.

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1 THE COURT: Okay.

2 MR. McKAY: Your Honor, if I may?

3 First of all, "willfully" is a legal term of art that  
4 have different meanings in different contexts. There are  
5 contexts in which it means actually knowing the specific law  
6 that you are violating. That's not the specific case. But it  
7 is a confusing legal term.

8 What Ms. Shapiro is advocating for is exactly what the  
9 Court has said, at second paragraph of 37: Intentionally and  
10 knowingly entered into the conspiracy or agreement with a  
11 criminal intent, that is, with awareness of the generally  
12 unlawful nature of the acts.

13 That's exactly what she is arguing for.

14 THE COURT: It is here, yes.

15 MS. SHAPIRO: Your Honor, I guess part of the point  
16 here is that we've objected to this particular instruction  
17 which goes on for numerous pages and extensively gets into the  
18 circumstantial evidence point yet again, now the third time in  
19 the instructions, and we think when you read this instruction,  
20 as a whole, it's unbalanced. So, we are suggesting some  
21 additional language. It may be alluded to earlier but we think  
22 it is important to keep the instruction balanced and that  
23 without it, it is too heavily weighted in favor of the other  
24 language about how easy it is to find that someone has joined  
25 an illegal conspiracy. That's really the point.

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1           So, if the Court wants to go back to a shorter version  
2 we are happy with that, that's what we initially proposed but  
3 we feel quite strongly that in this, with this instruction, if  
4 the Court is going to keep the extensive discussion that  
5 follows about circumstantial evidence, that it's important even  
6 if it's maybe a little repetitive to include, make sure that  
7 the concept that the jury has to find this concept of  
8 willfulness, as it applies in the context of this element of  
9 conspiracy, even clearer.

10           THE COURT: In my view, each paragraph here has a  
11 separate purpose and I do not think that repeating the notion  
12 of willfulness or that one knew that he was doing something  
13 unlawful, will add. I think it may detract and be more  
14 confusing.

15           Let's go to the next point.

16           MS. SHAPIRO: The next, I know the Court has thought  
17 about this because it was briefed extensively but just to note  
18 for the record our objection.

19           We did ask several times in original requests to  
20 charge, the objections we filed on Tuesday as well as in our  
21 July 1, 2018 letter, that the Court instruct the jury that it  
22 had to unanimously agree on at least one company that was the  
23 intended victim of the conspiracy. I understand Court has no  
24 doubt considered that but I just want to preserve the  
25 objection.

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1 THE COURT: I think that is not the law.

2 The next point? Does the government have anything up  
3 to page 41?

4 MR. McKAY: Not until page 44, your Honor.

5 MS. SHAPIRO: This is another thing I am sure the  
6 Court has thought about but I want to note. On 43, we had  
7 proposed -- well, hold on one second. (pause) The only thing  
8 actually, and again I know the Court took additional briefing  
9 from the government but we do object to the third paragraph on  
10 page 43 and the sentence that says: Additionally, a defendant  
11 need not be a fiduciary for the reasons.

12 We are not aware of any Second Circuit authority for  
13 this, we think it is confusing and unnecessary given that it is  
14 a conspiracy charge and I think we laid this out both in our  
15 most recent objections at page 60, note 58 and in our initial  
16 objections at 66, note 50.

17 THE COURT: You are saying that the third paragraph is  
18 inconsistent with the law?

19 MS. SHAPIRO: This notion that the defendant need not  
20 be a fiduciary, just that sentence.

21 THE COURT: And what is wrong with that?

22 MS. SHAPIRO: Well, I don't think that's the law, your  
23 Honor. I think that the reasoning of the case law is that the  
24 reason is that public officials do have a fiduciary duty and in  
25 the private context that's not the case, that it's not



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1 required.

2 THE COURT: I think maybe you and I are reading this  
3 differently.

4 To me what this is saying is that someone can be found  
5 guilty of honest services fraud if that person participates in  
6 a scheme intended to deprive the public of right to a public  
7 officials honest service. So, it is not talking about the  
8 general liability of an individual, it is talking about an  
9 individual who participates in a scheme to deprive the public  
10 of the public official's honest services.

11 MS. SHAPIRO: I see what you are saying, your Honor.  
12 I guess maybe that it is more of an issue for Adam Skelos, I  
13 guess, than Dean.

14 THE COURT: Right.

15 MS. SHAPIRO: I don't know if they have any comments  
16 on it or not. I found it confusing, so.

17 THE COURT: It may be that it is the first clause that  
18 is confusing.

19 MS. SHAPIRO: Yes. I mean I think, again, they can  
20 speak for their client but it might be clearer if -- I think  
21 that is what's confusing. Obviously we are not disputing that  
22 a private citizen can be found guilty if they participate in a  
23 scheme to deprive the public of the public official's honest  
24 services.

25 THE COURT: I think it would be better to phrase it

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1 positively rather than negatively, as you are doing. I mean  
2 positively as are you doing.

3 MR. KENNEY: You are taking out the language in the  
4 first line.

5 THE COURT: We are considering what the lead-in should  
6 be to the third paragraph on page 43. It begins with a  
7 negative proposition which is not usually as useful as the  
8 positive one.

9 MR. KENNEY: May I make a suggestion, your Honor:  
10 Additionally, a private citizen -- strike for instance -- does  
11 not owe a duty of honest services to the public but can be  
12 found guilty of honest services fraud, etc.

13 THE COURT: How about: Someone who is not a fiduciary  
14 can be guilty of this offense, a private citizen, for instance,  
15 and so on.

16 MR. KENNEY: It seems to me for the jury "fiduciary"  
17 is not particularly meaningful and maybe that should come out.

18 THE COURT: How about someone who is not a public  
19 official --

20 MR. KENNEY: Yes.

21 THE COURT: -- can be guilty of this crime, of this  
22 offense.

23 MR. KENNEY: That's clear.

24 THE COURT: That is better, I think.

25 Any objection to that?

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1 MR. McKAY: So it would be --

2 THE COURT: I will read it, if you would like:

3 Someone who is not a public official can be guilty of this  
4 offense. And then you go on with the rest of the paragraph, a  
5 private citizen.

6 MR. McKAY: No objection.

7 THE COURT: Okay. Thank you for that. That does make  
8 it clearer.

9 I don't think we need to keep in "additionally."

10 MS. SHAPIRO: That's right, your Honor.

11 MR. McKAY: No objection.

12 THE COURT: Okay.

13 Ms. Shapiro, one point of yours may have gotten  
14 inadvertently lost. On page 37, paragraph 2, first sentence at  
15 the end of it you were proposing to add?

16 MS. SHAPIRO: Yes.

17 THE COURT: "And the specific intention of furthering  
18 its illegal objective."

19 MS. SHAPIRO: Correct, your Honor.

20 THE COURT: I haven't heard the government on that.

21 We are on page 37, paragraph 2, line 3. At the end of  
22 that sentence that ends on line 3, after the word acts, add:  
23 And the specific intention of furthering its objective.

24 MS. SHAPIRO: Its illegal objective.

25 THE COURT: Its illegal objective.

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1 MR. McKAY: Your Honor, I think the point that I had  
2 made is that if you look three lines up it says: Participated  
3 in the conspiracy with knowledge of its unlawful purpose and in  
4 furtherance of its unlawful objective.

5 THE COURT: I think it is taken care of there. Okay.

6 MS. SHAPIRO: So the next thing we have is something  
7 on 44 but I think the government said it had something on 44 as  
8 well.

9 MR. McKAY: Also on 44.

10 THE COURT: Okay.

11 MS. SHAPIRO: You go first.

12 MR. McKAY: So, the first paragraph begins by defining  
13 whether a statement is false and then the third sentence says:  
14 The government must prove that the defendant made false  
15 representations deceitfully, that is, with the specific intent  
16 to harm or defraud the State of New York.

17 Our concern on that is that, first of all, that  
18 doesn't talk about what is false and what is not false and  
19 scheme to defraud has been defined just earlier on page 43,  
20 second to last paragraph: That, thus, a scheme to defraud in  
21 this context is a plan to deprive the State of New York and its  
22 citizens of their right to Dean Skelos' honest services through  
23 bribery.

24 So, we think this sentence is redundant of that --

25 THE COURT: Yes.

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1 MR. McKAY: -- so it should be left out. Though, if  
2 it were to be included, we think it should just be consistent  
3 with the prior sentence because our understanding is that the  
4 consideration here is defraud the citizens of its honest  
5 services, not a specific harm --

6 THE COURT: Right.

7 MR. McKAY: -- to the State of New York which specific  
8 harm implies something different.

9 THE COURT: I will take out the last sentence of the  
10 first paragraph on page 44.

11 Go ahead, Ms. Shapiro.

12 MS. SHAPIRO: I was just going to, just observe that  
13 the discussion just illustrates how ill-suited the statute is  
14 to cover bribery but that's a debate for another day.

15 That's fine with us, your Honor.

16 THE COURT: Okay.

17 MS. SHAPIRO: I had something just two paragraphs down  
18 and I know the Court has considered this because we briefed it  
19 on July 1st and the government responded, I believe last night,  
20 but I do want to preserve our objection and note that we  
21 believe that we are entitled to an instruction as we proposed  
22 in, most recently, in the red line we submitted on July 3rd; at  
23 page 61 towards the bottom, that an omission of material facts  
24 may only constitute a false representation if the government  
25 proves that Dean Skelos had an affirmative duty to disclose the

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1 omitted facts. If the government fails to prove that Dean  
2 Skelos had such a duty, then any omission alleged by the  
3 government cannot constitute a false representation and must be  
4 disregarded. And we cited several authorities in footnote 60  
5 for that proposition.

6 So, I just want to note our objection to that on those  
7 grounds.

8 THE COURT: Thank you. I did consider that.

9 MS. SHAPIRO: Then, I just want to also again for the  
10 same purpose we have already discussed it, but on page 45 there  
11 are a couple of places where the -- the "as opportunities  
12 arise" language appears again and for the same reasons --

13 THE COURT: Yes.

14 MS. SHAPIRO: -- we object to that.

15 THE COURT: That's noted.

16 MR. McKAY: We have one page on page 45, or perhaps  
17 two things.

18 THE COURT: Okay.

19 MR. McKAY: The second full paragraph which begins the  
20 government does not have to prove. The second sentence refers  
21 to being influenced to take a specifically identified official  
22 action. We think that phrase is inconsistent with the "as  
23 opportunities arise."

24 THE COURT: It is.

25 MR. McKAY: And should be struck.

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1 MS. SHAPIRO: We object, your Honor.

2 THE COURT: So, you would take out, in exchange for  
3 being influenced to take a specifically identified official  
4 action.

5 MR. McKAY: We would just take out the phrase:  
6 Specifically identified. Oh, I guess then it says the same  
7 thing twice.

8 THE COURT: Right.

9 MR. McKAY: It is fine to say it once in exchange for  
10 being influenced to take official action as the opportunities  
11 arose.

12 THE COURT: Yes. I will make that change.

13 MS. SHAPIRO: Again, we object, your Honor.

14 THE COURT: Right.

15 Should "opportunity" be singular or plural? Does it  
16 matter?

17 MR. McKAY: Probably plural.

18 THE COURT: Okay. Yes.

19 MR. KENNEY: May I note, your Honor, I will be going  
20 to Judge Sweet's courtroom for 20 minutes and I will be back.

21 THE COURT: Okay. Thank you.

22 MR. BROD: And of course I'm still present here for  
23 Adam Skelos.

24 THE COURT: You are in charge.

25 MS. SHAPIRO: Your Honor, we had a couple points on

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1 page 46.

2 THE COURT: Okay.

3 MS. SHAPIRO: On the top of the page at the end of the  
4 first line the sentence starts, "Also," yet again, the Court is  
5 repeating the circumstantial evidence point --

6 THE COURT: Right.

7 MS. SHAPIRO: -- we just submit it has been -- it  
8 appears so many times in the charge and for all the reasons I  
9 discussed earlier, we think it is unnecessary and repetitive  
10 and makes the charge unbalanced. So, we ask the Court to  
11 consider taking that out here.

12 THE COURT: Again, for the reasons I have expressed  
13 earlier where a concept is likely to be somewhat foreign for a  
14 juror, I think it bears repeating.

15 MS. SHAPIRO: Understood, your Honor.

16 And then two other things in the second paragraph on  
17 this page, one is just in the third line we object to "as  
18 opportunity arise" for the same reasons.

19 THE COURT: Right.

20 MS. SHAPIRO: And then the last sentence says: On the  
21 other hand, if you find that the government has proven that  
22 Dean Skelos accepted payments or things of value intending, at  
23 least in part, to take official action in return for those  
24 payments, again, as the opportunities arise, then this element  
25 of the substantive crime will have been proven.



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1           In addition to the "as opportunities arise" issue, we  
2 think at least in part is objectionable, it is confusing, and  
3 may mislead the jury into believing that the public official  
4 does not need to intend to make good on the corrupt bargain and  
5 the Court has, I think otherwise, accepted our argument that at  
6 least the official has to have the intent to make good on the  
7 bargain so we would ask the Court to strike that phrase at, at  
8 least in part.

9           MR. MCKAY: Your Honor, may I propose a compromise  
10 which is, at least in part in our view it is critical for the  
11 dual intent point that the Court has settled, I believe, in our  
12 favor. So, to remove any confusion there you could remove "at  
13 least in part" to after "in return." So it would say: To take  
14 official action in return, at least in part for those payments.

15           THE COURT: I think that's clearer.

16           MS. SHAPIRO: Yes, that's better, your Honor.

17           THE COURT: Okay. We will make that change. We are  
18 moving, on page 46, three lines from the bottom, we are taking  
19 the words "at least in part" out of that, placing them right  
20 after, "in return," on the second line from the bottom.

21           MS. SHAPIRO: Your Honor, the next thing I have is on  
22 page 47.

23           So, I know what you are going to say about this but  
24 towards the bottom of the page on the last paragraph, once  
25 again it says circumstantial evidence, if believed, is of no

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1 less value than direct evidence and we object to that for the  
2 same reason, that it's again repetitive and makes the charge,  
3 as a whole, unbalanced to discuss that so many times.

4 THE COURT: I am going to reread the paragraph. I  
5 think we could take out the second sentence which I think is  
6 redundant.

7 MR. McKAY: Your Honor, is that the one that begins  
8 circumstantial evidence, if believed.

9 THE COURT: If believed, right.

10 MR. McKAY: That's fine.

11 THE COURT: I will take that out.

12 MS. SHAPIRO: The next thing I had, again I understand  
13 the Court considered this and we discussed it earlier in  
14 connection with the other instruction but we just want to  
15 preserve our objection that we request that the Court instruct  
16 the jury that it has to unanimously agree on one company that  
17 was the intended victim for the reasons we argued previously.

18 THE COURT: I note your objection.

19 MS. SHAPIRO: Thank you, your Honor.

20 THE COURT: Does anyone think we should keep conscious  
21 avoidance?

22 MR. McKAY: Your Honor, we have one thing before we  
23 get to that --

24 THE COURT: Okay.

25 MR. McKAY: -- which is page 50.

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1           Here you have if you find all the required elements  
2           language that was not included in the extortion count and, as  
3           we discussed, it is redundant of the fact that the Court has  
4           already made clear that the jury needs to find each element  
5           beyond a reasonable doubt. So, we think it's better to strike  
6           it both because it's correct and for consistency purposes.

7           MS. SHAPIRO: And, your Honor, we object for the  
8           reasons discussed earlier.

9           THE COURT: I am going to take it out, noting your  
10          objection.

11          Conscious avoidance.

12          MS. SHAPIRO: Well, your Honor, we object. We think  
13          first of all that, and we have briefed this a little bit but  
14          there is no legal basis for it. We think on the facts of this  
15          case it makes absolutely no sense. There is no evidence to  
16          suggest that Dean Skelos was aware of a high probability of any  
17          particular fact that he should have known and failed,  
18          deliberately failed to investigate or failed to verify it. I  
19          have no idea what the conceivable basis could be for the  
20          instruction and the facts in this case but I don't know what  
21          the government's position is. I asked them before the break  
22          and they said they were going to confer. And so, maybe they're  
23          not asking for it.

24          MR. DISKANT: Your Honor, we are asking for it.

25          We think it is appropriate on these facts because we

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1 think the defendants have put in dispute the defendants'  
2 knowledge of certain elements that are essential to a finding  
3 of guilty and there is a factual predicate from which the jury  
4 could in fact find the defendants deliberately closed their  
5 eyes to them.

6 THE COURT: Can you remind me?

7 MR. DISKANT: Absolutely, your Honor.

8 So, I think perhaps the easiest example is the PRI  
9 scheme in which there is really no question that there is an  
10 agreement or at least a jury could find that there is an  
11 agreement between Dean and Adam Skelos which is going to  
12 involve Adam Skelos getting a job or getting payments from PRI.  
13 And there is also facts from which the jury could find that  
14 Dean Skelos was put on notice of any number of red flags about  
15 this situation -- the call from Anthony Bonomo, for example, in  
16 which he is told about the fact that his son is not showing up  
17 for work and is causing a disturbance when he does, the visit  
18 from Al D'Amato when Al D'Amato provides the same information.  
19 A jury could conclude on those facts that by not asking for  
20 more information and by not doing more, Dean Skelos was  
21 deliberately closing his eyes to information that would lead a  
22 reasonable person to see the full criminal nature of the  
23 agreement.

24 This is directly on point, I should note, with Second  
25 Circuit law on this very instruction. The Second Circuit's key

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1 case on this is United States v. Reyes which is 302 F.3d 48.  
2 In Reyes you had a defendant who is charged with conspiring to  
3 distribute stolen air bags, I believe it was, and there is no  
4 question that the defendant in that case had agreed with other  
5 people to distribute air bags. There was also no question that  
6 there were lots of facts from which the defendant should have  
7 known that the air bags in question were stolen. But the  
8 defendant denied knowing that the air bags were stolen which is  
9 effectively denied knowing that everything around him happening  
10 was criminal. The Second Circuit said there was a factual  
11 predicate there and was properly given there because there are  
12 facts in the record from which the jury could conclude that the  
13 defendant should have been on notice, should have been aware of  
14 the full criminal nature of what he was doing.

15 So, we think that the record, as it has come in here,  
16 supports giving the instruction.

17 MS. SHAPIRO: Your Honor, may I respond?

18 THE COURT: Yes.

19 MS. SHAPIRO: Respectfully, that makes no sense.

20 This isn't a case about stolen property where the  
21 government has to show that the defendant knew the property was  
22 stolen. The government has not cited a single case involving  
23 the charges here and it doesn't make any sense. This is a  
24 bribe -- these are all bribery-related crimes, there has to be  
25 a quid pro quo. Either Dean Skelos was aware that there was a

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1 quid pro quo or he wasn't, but it is hard for even me to  
2 understand how this concept could have anything to do with this  
3 case. It just doesn't make any sense, your Honor, and I think  
4 it is going to be incredibly confusing for the jury and there  
5 isn't any -- it just doesn't make any sense in the context  
6 there isn't an element, they're not even explaining what he  
7 would have known that would have made him guilty if he wasn't,  
8 under their theory, already guilty because he was supposedly  
9 engaged in this bribery-related scheme.

10 I mean, it just doesn't make any sense in the context  
11 of a bribery scheme.

12 THE COURT: I think I finally understand it, which is  
13 as was just described.

14 If Dean Skelos purposely avoided learning the extent  
15 of the unlawfulness of paying Adam for a no-show job, he was  
16 engaging in conscious avoidance of understanding the magnitude.

17 MR. BROD: It is not unlawful for Adam Skelos to have  
18 a no-show job. What is unlawful is for there to be an  
19 agreement -- an agreement -- a corrupt agreement, and all of  
20 what is in here essentially boils down to that.

21 So, as I was listening to Mr. Diskant talk about Dean  
22 Skelos closing his eyes to the existence of a corrupt agreement  
23 between him and these other parties, I was struck by -- and  
24 maybe it was just -- I did not, for the life of me, understand  
25 what he was talking about. I do not think it is possible for

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1 you to close your eyes to the existence of a corrupt agreement  
2 between yourself and somebody else, or any agreement.

3 So, for all of the reasons that Ms. Shapiro said --

4 THE COURT: I think the point -- I am sorry to  
5 interrupt, but I think the point is that if Adam had put in a  
6 full day's work for his pay that it would have been less  
7 corrupt.

8 MS. SHAPIRO: No, your Honor. I'm sorry.

9 MR. BROD: No, your Honor.

10 THE COURT: Do I have the government's point wrong?

11 MR. DISKANT: Somewhat slightly, and let me know at  
12 the outset because this would shorten this a little. We would  
13 have no objection to the Court giving this instruction solely  
14 with respect to Dean Skelos. We agree that it probably is not  
15 appropriate with respect to Adam Skelos.

16 With respect to Dean Skelos, the Court I think has it  
17 exactly right, which is that there are certain facts about this  
18 arrangement that the defendant is claiming to be intentionally  
19 avoiding confirming. We wouldn't argue it with respect to the  
20 defendant's state of mind. We agree conscious avoidance, we  
21 would have to argue that based on the other evidence in the  
22 case. But, with respect to the bribe payor's state of mind  
23 there has been an enormous amount of argument through  
24 cross-examination and in opening about how the reason Anthony  
25 Bonomo is giving Adam Skelos this job is because he feels bad

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1 for Adam Skelos or because he is an old friend of Dean Skelos.  
2 Similar arguments have been made about Charles Dorego, he is  
3 just trying to curry with a powerful politician. That is the  
4 issue on which conscious avoidance would be most appropriate,  
5 that is that the defendant deliberately closed his eyes to what  
6 was actually happening, intent of the bribe payor, which  
7 completes the quid pro quo.

8 MR. THAYAMBALLI: Your Honor, may I add something?

9 I think it may help if we step back and consider when  
10 conscious avoidance is appropriate in a conspiracy case and, as  
11 the instruction explains, conscious avoidance is only  
12 appropriate as to the defendant's knowledge of the objects of  
13 the conspiracy and not to whether the defendant agreed with  
14 someone else to become part of the conspiracy. That's in this  
15 conscious avoidance charge, it is also in, I believe, the  
16 Farini case in the Second Circuit. So, analogously, if you  
17 can't consciously avoid knowing that you have entered into a  
18 conspiracy, you can't consciously avoid knowing that you have  
19 received a bribe or that you are entering into a quid pro quo.  
20 Both of them involve agreements and it is an intent element not  
21 merely a knowledge element. And so, as a result, that is  
22 precisely why it makes no sense to say that Dean Skelos  
23 consciously avoided knowing whether he was receiving bribes,  
24 the bribes require intent and not merely knowledge.

25 MS. SHAPIRO: Your Honor, just one other thing I was



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1 going to add and I know Mr. Brod made this point, but the fact  
2 of the no-show job in and of itself doesn't prove the crime so  
3 there had to be an exchange and you can't consciously avoid  
4 being involved in a quid pro quo. They can argue that the fact  
5 that it was supposedly a no-show job is evidence that helps  
6 support their theory of a quid pro quo but it doesn't -- in and  
7 of itself, the fact that Adam wasn't showing up to work isn't  
8 what makes it a crime. It has to be that the money was  
9 accepted and he wasn't going to work and Dean Skelos knew that  
10 and was allowing that to happen in exchange for his support for  
11 legislation or whatever they're going to argue the official  
12 action is. But the fact of it being supposedly a no-show job  
13 or not and whether Mr. Skelos knew about that doesn't, itself,  
14 prove a crime, even if true. That's the point, your Honor.  
15 It's just not relevant to the elements of these crimes. That's  
16 why they're not able to cite a corruption case for this. And I  
17 also want to point out that in the last trial, the government's  
18 argument was that it was Adam Skelos who was consciously  
19 avoiding, not Dean.

20 In any event, we think this is incredibly confusing,  
21 it is inappropriate, and it would be legally erroneous for the  
22 Court to give the instruction on the facts of this case with  
23 these charges and the evidence as it has come in.

24 MR. DISKANT: Just very briefly.

25 That's not accurate. Ms. Shapiro is not correct. We

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1 argued it with respect to Dean Skelos at the last trial. I can  
2 give this Court a citation, United States v. Skelos. These  
3 very arguments were presented to the Second Circuit on appeal.  
4 The Second Circuit said absolutely nothing about them while  
5 clearly coming out on other issues and providing guidance for  
6 the tremendous trial. If the Second Circuit thought this  
7 instruction was improperly given, assuredly they would have  
8 said something in response to Ms. Shapiro raising this claim on  
9 appeal. They didn't because it was appropriately given the  
10 first time and we believe it should appropriately be given the  
11 second time.

12 THE COURT: What are other examples of Dean Skelos'  
13 conscious avoidance?

14 MR. DISKANT: I think it has to do with his, with  
15 respect to each scheme, his understanding of the intent of the  
16 bribe payor or the extortion victim. They're flip-sides of the  
17 same point.

18 So, with respect to each of them, we presume the  
19 defendant -- well, we know the defendants have and we presume  
20 they will continue to offer some sort of innocent explanation  
21 for what Dean thought might be in the mind of Anthony Bonomo.  
22 Right? Anthony Bonomo just feels sorry for Adam and he is  
23 doing this because he is an old-time friend; Charles Dorego is  
24 a powerful real estate executive who wants to curry favor with  
25 him; AbTech is a legitimate business that really thinks that

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1 Adam is an up-and-comer. It is the bribe payor's state of  
2 mind, the bribe payor's intent or the extortion victim's state  
3 of mind that really comes into play that we believe Dean Skelos  
4 has been denying knowledge of what Anthony Bonomo's intent was  
5 in making these payments, denying knowledge of what AbTech was  
6 doing in making these payments, denying knowledge of what  
7 Charles Dorego and Glenwood were doing in directing the title  
8 work.

9 We believe that's the appropriate basis for the  
10 instruction.

11 MS. SHAPIRO: Your Honor, just to be clear also on  
12 that point, it has to be a reasonable expectation on the  
13 victim's part but I don't think that adds anything. They also  
14 haven't pointed to anything that actually shows any deliberate  
15 actions on the part of Dean Skelos to avoid learning the facts.  
16 And it's quite clear from all the case law including the  
17 Supreme Court decision in Global Tech and the Second Circuit  
18 cases that even if in a situation in which conscious avoidance  
19 might otherwise be appropriate, that it would not be  
20 appropriate -- that it requires a showing not only that the  
21 defendant was aware of a high probability of the supposed fact  
22 but also that the defendant deliberately avoids learning those  
23 facts and there is no evidence that Dean Skelos ever said, you  
24 know, I'm shutting my eyes to this, I'm going to avoid asking  
25 these questions.

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1 THE COURT: He said "work it out" instead of having a  
2 serious discussion of Adam's work on the site.

3 MS. SHAPIRO: Well, Mr. Bonomo testified that he told  
4 Dean Skelos what was going on and what Curcio had told him so  
5 Dean Skelos knew those facts. He knew those facts. Bonomo  
6 described them to him. What was he deliberately avoiding  
7 learning, your Honor? It just doesn't make any sense and,  
8 frankly, I'm really -- I don't understand why they're pushing  
9 so hard for this in the context of this particular trial when  
10 they have so many other things they can argue based on the real  
11 instructions and the real elements here. I just don't  
12 understand and that is on them but I really don't -- I think  
13 they're leading the Court into error on this if the instruction  
14 is given and it would be extremely prejudicial to Dean's  
15 defense and Adam's defense.

16 Lastly, with regard to the argument that was made in  
17 the appeal, it was actually made by Adam Skelos and the reason  
18 it was in Adam Skelos' brief and not in our brief was because  
19 the argument in the trial Court was based on Adam. But I don't  
20 think that's important. I think what's important -- and the  
21 Circuit did not pass on it one way or the other in any direct  
22 way and I think what's important is the context of this trial  
23 and it's completely inappropriate here.

24 THE COURT: Could you tell me, I understand you think  
25 there is no factual basis for it. What is prejudicial if there

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1 is no factual basis?

2 MS. SHAPIRO: You know, what's prejudicial is that it  
3 adds a confusing instruction that doesn't fit the facts of the  
4 case and the jury is going to be misled, potentially. So, and  
5 that's why the Second Circuit has held repeatedly that the  
6 instruction is not supposed to be given unless there is a  
7 factual basis.

8 Now, you know, the Court may think, well -- and  
9 respectfully -- well, maybe it will be harmless error if the  
10 defendants are convicted but I don't think that's the  
11 appropriate way to look at this. I mean --

12 THE COURT: I'm not suggesting that.

13 MS. SHAPIRO: No, I understand, your Honor, and I  
14 apologize, I am just being a little rhetorical here. But, the  
15 point is that it's, in any case, whether it is appropriate or  
16 not, it can be a very important instruction for the government.  
17 It essentially lowers the burden of proof for the government on  
18 the intent element which is so critical in this particular case  
19 and I think it adds a level of confusion especially because the  
20 intent element here isn't so much about knowledge of the facts  
21 like the supposed no-show job, it is really about whether the  
22 defendant understood that he was engaging in a quid pro quo,  
23 that he was intending to be influenced by these jobs or what  
24 the government calls payments to his son and whether he was --  
25 he was asking for them with a specific purpose of engaging in

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1 that kind of a quid pro quo and essentially trading his vote  
2 for the benefits. That's what the case is about, it is not  
3 about really about knowledge in a more classic case like the  
4 stolen property case or a securities fraud case or something  
5 like that. It is just out of context and I think we feel very  
6 strongly that it is going to confuse the jury and distract them  
7 from the real issue of criminal intent or not that they need to  
8 be thinking about.

9 THE COURT: With respect to this for that, if a  
10 defendant deliberately avoids knowing the full extent of that,  
11 I think that's relevant.

12 MS. SHAPIRO: Your Honor, but the issue isn't -- the  
13 size of that isn't actually relevant. So you could have a  
14 bribery scheme where it is a minimal payment.

15 THE COURT: I don't think I am being clear enough.

16 The full extent of Adam's refusal to put in a full  
17 day's work is relevant, I think, to Dean's state of mind as he  
18 works out the quid pro quo.

19 MR. BROD: Your Honor, if I might, Judge?

20 I think the flip side of this is illustrated by the  
21 so-called AbTech scheme in which there is no plausible  
22 allegations other than a no-show job -- I'm waiting for the  
23 government to disagree with me on this point -- but, clearly,  
24 Adam was working but the yet the government is able to put in a  
25 case that the payments given to Adam were not just for the work

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1 he was doing on it but to secure Dean Skelos' support. The  
2 fact that a job may be a no or low-show job may be evidence  
3 that might speak to intent but it's not the crime. The crime  
4 is always the corrupt exchange. And, as I said before, I do  
5 not think it is possible for a human being to be willfully  
6 blind to the existence of an agreement to which they are a part  
7 and don't think that makes any sense.

8 MR. DISKANT: Your Honor seems to understand our  
9 position.

10 Just very briefly, I think Mr. Brod's argument boils  
11 down to this is why it is a jury instruction that can be argued  
12 to the jury. It is some evidence that is relevant. To his  
13 bigger point about how he doesn't know how someone can  
14 unknowingly enter into a conspiracy, that's why I used the  
15 example of the car parts. Right? There is clearly an  
16 agreement going on to accomplish a common goal. The defense in  
17 that case was that the defendant was claiming to be unaware of  
18 a fact that was essential to turn this from an innocent  
19 agreement into a criminal one.

20 THE COURT: And what is it here?

21 MR. DISKANT: Here it is aspects of the bribe payor,  
22 the extortion victim's mental state and what is going on with  
23 respect to the, as your Honor put it, the "that" in the "this  
24 for that." So, in PRI it has to do with the circumstances  
25 surrounding why it is that Adam Skelos is getting paid and what

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1 is actually happening with respect to that employment. The  
2 term could potentially turn what the defendants have argued is  
3 an innocent relationship into a criminal one. The defendant  
4 has denied knowledge of that. We have elicited testimony that  
5 the defendant was plainly on notice that there was something  
6 improper there and to the extent he decided not to find out  
7 more, that's classic conscious avoidance.

8 Your Honor heard a little bit of that today on the  
9 AbTech scheme where Nick Barrella, the lobbyist, calls the  
10 defendant to say your son just tried to retain me. And there  
11 is a pause on the call and Dean Skelos' answer is not to ask  
12 more questions about what Adam is doing, not to try and find  
13 out more about the situation, but simply to say something that  
14 he knows won't actually be true, which is Adam Skelos is not to  
15 lobby, he is not could come to Albany. That is another fact  
16 from which a juror could say that the defendant is deliberately  
17 closing his eyes to information before him from which he should  
18 have understood the full scope of the situation.

19 THE COURT: All right. To bring this to a close --  
20 yes?

21 MR. THAYAMBALLI: Sorry. I would like to add one  
22 thing.

23 The government is focusing on the intent of the payor  
24 and how Dean Skelos consciously avoided knowing what the  
25 payor's intent was, but for both extortion and honest services



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1 fraud there is a corresponding component which is the intent of  
2 Dean Skelos. For extortion, Dean Skelos has to have intended  
3 for the payor to believe that he would take official action in  
4 exchange for the payment. For honest services fraud, he has to  
5 have intended to make good on the bargain and exchange official  
6 action for the payment. It doesn't make any sense for Dean  
7 Skelos to have that corresponding intent if he is deliberately  
8 avoiding knowing what the payor intends to do. He has to know  
9 that there is an exchange going on in order for his intent to  
10 satisfy the elements of either extortion or honest services  
11 fraud. And so, as a result, there is no conceivable situation  
12 in which he can consciously avoid knowing the intent of the  
13 payor and that would satisfy the elements of the offenses.

14 MR. BROD: Just on prejudice, a big part of the  
15 prejudice here is that the jury may leap to the same inference  
16 that the government is making here, which would be incorrect,  
17 and that would be willful blindness to the commissions of  
18 Adam's employment at PRI matters. And it doesn't. So that  
19 would be a large part.

20 In other words, Judge, we are saying the government is  
21 completely wrong but the jury might buy it.

22 THE COURT: I understand.

23 I don't think I fully understand the government's  
24 point.

25 MR. McKAY: Your Honor, I think one thing I can say is

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1 to the extent that we are going to start closings tomorrow, I  
2 don't think there is any chance we are going to get all the way  
3 through them, I'm happy to not include anything about this in  
4 my closing tomorrow if the Court wants to reserve on this and  
5 think more about it because I do think there is a lot of other  
6 issues we have to get to today, we ought to do that.

7 THE COURT: Yes. All right. Let's move on.

8 MS. SHAPIRO: So, the next thing we had was on page  
9 54.

10 MR. McKAY: We have something earlier than that, your  
11 Honor, if we could.

12 THE COURT: Okay.

13 MR. McKAY: We are on page 53.

14 THE COURT: Yes.

15 MR. McKAY: This is the elements of bribery.

16 MR. KENNEY: Before Mr. McKay starts, I want to note  
17 that I have returned.

18 THE COURT: Thank you.

19 MR. McKAY: First, the third element that Dean Skelos  
20 solicited, demanded, etc. something of value from another  
21 person. We would add "something of value for himself or  
22 another person" since it does not have to be directly to Dean  
23 Skelos and in fact the allegation here is that it is not  
24 directly to Dean Skelos. Say, for himself or a third-party.

25 THE COURT: You want to strike "from another person."

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1 MR. McKAY: No. "From another person" can remain but  
2 we would like to clarify that Dean Skelos is accepting  
3 something of value but that it doesn't necessarily have to go  
4 to him, that it's something of value for himself or another  
5 person.

6 THE COURT: I see. Okay.

7 MS. SHAPIRO: I think that's fine. It is obviously  
8 correct. You might want to say "or a third-party" because  
9 otherwise it is a little awkward, otherwise you are saying  
10 "another person" twice.

11 THE COURT: It is awkward. For himself. It is hard  
12 to de-awkwardize it.

13 MR. McKAY: I think a third-party is fine.

14 THE COURT: Third, that he solicited, etc., to accept  
15 something of value for himself or a third-party. From another  
16 person?

17 MR. McKAY: You might actually add it after "from  
18 another person." Something of value from another person,  
19 comma, for himself or a third-party.

20 THE COURT:

21 (Continued on next page)  
22  
23  
24  
25

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1 THE COURT: Okay. Or a third party.

2 MR. McKAY: Then the sixth element says, "Sixth, that  
3 the official act involved something of value of at least  
4 5,000." So here is where there's some awkwardness because the  
5 statute says "transaction." The Second Circuit has held that  
6 *McDonnell* doesn't apply to 666. We agreed for the purpose of  
7 these instructions to use the official act language in the 666  
8 instruction, so I'm not going back on that, but what I would  
9 say is that when -- later, when we actually flesh out this  
10 element, the Court has said something a little different.

11 So if you look to page 60 --

12 THE COURT: Right.

13 MR. McKAY: -- you describe the sixth element as that  
14 the payment was related to official action on a government  
15 matter or was at least 5,000. I think that's a better  
16 formulation and should be included when you introduce the  
17 elements. I think the idea --

18 THE COURT: I think that's right. So we'll strike all  
19 of the last line on page 53 other than the word "sixth," and  
20 we're going to add that the payment was related to official  
21 action on the government matter worth at least \$5,000.

22 MR. McKAY: Thank you, your Honor.

23 Then the last thing on this page, and this carries  
24 over to the few following pages, but in the defendant's  
25 proposal, which the Court has adopted in your draft, the fourth

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1 and fifth elements are broken up into two elements. The way  
2 the Court had previously instructed the jury on this and the  
3 way we understood it was that those were the same elements,  
4 that the corrupt intent was the intent to take an official act  
5 in exchange for the thing of value.

6 So what we would propose is exactly what the Court did  
7 the first time. Well, not perhaps exactly, but close. Last  
8 time your Honor said "Dean Skelos acted corruptly with the  
9 intent to be influenced or rewarded with respect to a  
10 transaction of the State of New York."

11 I would take out "rewarded," to the extent we're  
12 breaking out gratuities, which is fine, but we would combine  
13 the fourth and fifth elements the way you did the first time,  
14 so it would say, "Dean Skelos acted corruptly with the intent  
15 to be influenced with respect to a transaction of the State of  
16 New York." And the reason for that is you're parroting the  
17 statutory language, which is appropriate for this section, and  
18 you can later elaborate on what the transaction is, that it's  
19 an official act.

20 MS. SHAPIRO: Your Honor, we object to that and we  
21 appreciated the Court had actually taken this suggestion, which  
22 I think is entirely correct as a matter of law, it's consistent  
23 with several other instructions in 666 cases, including the *Ng*  
24 *Lap Seng* case last year with Judge Broderick, and we think it's  
25 important to separate out the element and explain separately

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1 what corrupt means. So we would ask the Court to keep this the  
2 way it was.

3 THE COURT: Why aren't they one and the same?

4 MS. SHAPIRO: Well, because there's law as to what  
5 corrupt means. There's two separate things; one is the quid  
6 pro quo, and the intent that goes with that, but there's also  
7 case law that a corrupt intent involves some consciousness of  
8 unlawfulness or wrongdoing, and that is encompassed in the  
9 instruction the Court has in the draft, and we cited  
10 authorities.

11 THE COURT: I understand.

12 MS. SHAPIRO: I can repeat them all.

13 THE COURT: I think I'll leave it as is.

14 MS. SHAPIRO: Your Honor, the next thing, we had an  
15 objection on page 54, actually the last part of this  
16 instruction, which is on the elements of agent of organization  
17 or government.

18 Two points, your Honor. First, we object to  
19 instruction that all elected officials, including legislators,  
20 are by definition agents of the state government. And we cited  
21 several authorities in the most recent objections, docket 385  
22 at pages 77 to 78, note 84, our initial objections, docket  
23 number 349-2 at 82 to 83, note 60, and in our July 1st letter,  
24 docket number 378 at pages 8 to 9, which demonstrate that is  
25 not accurate.

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1 But also, at a minimum, it is improper to withdraw  
2 this question from the jury and direct the jury to make a  
3 finding that Dean Skelos was an agent. He's got a Sixth  
4 Amendment right, at a minimum, for the jury to make that  
5 factual finding. And the text of 666 treats government  
6 agencies, including subdivisions of the legislative branch, as  
7 separate, as we pointed out in our most recent objections,  
8 docket 83, 85 at 77, note 83, as well as the initial  
9 objections, docket 349 at 82, note 59.

10 THE COURT: I considered that and will keep the  
11 language I have.

12 MS. SHAPIRO: Thank you, your Honor.

13 MR. McKAY: We had something on the next page, page  
14 55, your Honor.

15 THE COURT: Yes.

16 MR. McKAY: At several points in the 666 instructions  
17 the defense has included and the Court has adopted the language  
18 from 666(c) about bone fide salary, wages, fees. I note for  
19 that parenthetical there is considerable dispute in the  
20 circuits about which of the subsections of 666 the bone fide  
21 salary applies to.

22 Because there's so much dispute, we're happy to leave  
23 it the way the defense has proposed it, but with one request,  
24 which is that the Court define bone fide at some point, because  
25 it's is not a plain language term the jury is likely to

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1 understand. And so we don't want the jury to be misled into  
2 thinking that, for example, a bribe payment is okay under 666  
3 just because it comes in the form of a salary. That is very  
4 clearly not the law.

5 And so we have a suggestion as to how it would be  
6 defined, which comes from the Eastern District case of *United*  
7 *States v. Walsh*, and it would say that bone fide means made in  
8 good faith without fraud or deceit.

9 MS. SHAPIRO: I think that's fine, your Honor.

10 THE COURT: That would come at the end of the second  
11 paragraph on page 55.

12 MR. McKAY: Yes, I think you would just say, "For  
13 these purposes, I instruct you that bone fide means," and then  
14 "bona fide" would be repeated several other times, you can  
15 perhaps refer the jury back to your earlier definition.

16 THE COURT: Okay.

17 MS. SHAPIRO: Your Honor, could we have a moment to  
18 confer?

19 THE COURT: Yes.

20 (Pause)

21 MR. BROD: Judge, the defense changed its position on  
22 this slightly.

23 THE COURT: On what?

24 MR. BROD: On this language that this does not include  
25 legitimate bone fide salary wages, fees, et cetera, and we



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1 don't think it's necessary. We don't think there's any dispute  
2 on this point. There's a stipulation for the federal funds.  
3 There's no other evidence in the case. It's not going to be an  
4 issue --

5 MS. SHAPIRO: Sorry, go ahead.

6 MR. BROD: There's not going to be a dispute about  
7 this point, so we ask this does not include legitimate and so  
8 on language be struck.

9 THE COURT: That entire sentence be struck?

10 MR. BROD: Yes, your Honor. And, of course, the  
11 additional language which the government proposed moments ago.

12 MR. McKAY: Is that on page 55 that you're striking  
13 it?

14 THE COURT: Yes, second paragraph, last sentence.

15 MR. McKAY: So then I guess I would ask, the language  
16 pops up again on 56, are they asking to strike it there as  
17 well?

18 THE COURT: The last sentence on 56. I take it you  
19 would strike it there as well.

20 MR. BROD: Could we have just a moment, Judge?

21 THE COURT: Sure.

22 (Pause)

23 MR. BROD: We think the language could be kept here as  
24 it is.

25 THE COURT: Keep it both places?

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1 MR. BROD: Just on page 56, Judge.

2 THE COURT: In other words, strike it from 55, keep it  
3 on 56, and then we would add the government's language, "For  
4 these purposes, bone fide means made in good faith without  
5 fraud or deceit."

6 MR. BROD: I think we can live with that, Judge.

7 THE COURT: Okay.

8 MR. McKAY: One other thing, on page 56, in the above  
9 paragraph it says if payment was made to a third party for the  
10 purpose of bribing Dean Skelos --

11 THE COURT: I'm not with you. Where are you on page  
12 56?

13 MR. McKAY: 56, third paragraph, which begins it is  
14 not necessary.

15 THE COURT: Yes, I see it.

16 MR. McKAY: Right before "Dean Skelos" we would delete  
17 the word "bribing" and replace it with "influencing."  
18 Influencing is the relevant concern here. Bribing is a little  
19 question begging.

20 THE COURT: Yes.

21 MS. SHAPIRO: Sorry, your Honor, to go back to this  
22 but, I don't know if I heard Mr. McKay indicate where he got  
23 that fraud or deceit language. Because I just looked it up and  
24 the definition is a bit different, so I don't know if he has a  
25 source for that.

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1 MR. McKAY: It is 156 F.Supp.3d 374, 384.

2 MS. SHAPIRO: What is it, though, a Southern District  
3 case?

4 MR. McKAY: Eastern District case quoting Webster's.

5 MS. SHAPIRO: Okay.

6 THE COURT: What is the difference in concept that you  
7 found online?

8 MS. SHAPIRO: I found a definition that talks about  
9 real, authentic, genuine, true, actual. I'm not going to  
10 reargue the point, I wanted to know where he was getting it,  
11 because I was seeing something different.

12 THE COURT: Okay. So Ms. Shapiro?

13 MR. McKAY: Can I confirm on 56 are we replacing  
14 "bribing" with "influencing?"

15 THE COURT: Yes.

16 MR. McKAY: Okay.

17 MS. SHAPIRO: Your Honor, this is similar to a point I  
18 made earlier, it's on the bottom of page -- sorry, I need to  
19 look at the right version.

20 The bottom of page 58, the last sentence on that page,  
21 "On the other hand, if you find that the government has proven  
22 that Dean Skelos accepted payments or things of value intending  
23 at least in part to take official action in return for those  
24 payments as the opportunity arose, then this element will have  
25 been proven." Apart from the "as the opportunity arose," which

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1 obviously we object to, this has the same problems as we  
2 identified earlier in a similar sentence where it said "at  
3 least in part," and I think --

4 THE COURT: Claiming dual purpose.

5 MS. SHAPIRO: No, I understand, but I think the  
6 issue -- I think the Court made a change earlier, so we would  
7 just want the same change. And we can flip back and try to  
8 find the page, but the concern here is just that, as phrased,  
9 it seems to suggest that the public official doesn't need to  
10 carry out his end of the supposed corrupt bargain, whereas the  
11 law requires that he at least intend to carry it out, even if  
12 it never comes to fruition. And the Court made a change  
13 earlier --

14 MR. McKAY: We agree.

15 THE COURT: What change?

16 MR. McKAY: I think the change we made was to move "at  
17 least in part" to after -- "in return."

18 MR. THAYAMBALLI: That's right.

19 THE COURT: All right. So we're moving "at least in  
20 part" to four places later. It will now read "to take official  
21 action, at least in part, in return for --"

22 MR. THAYAMBALLI: Your Honor, I believe the last time  
23 the phrase "at least in part" was put after the word "return,"  
24 but I think that they are essentially the same.

25 THE COURT: Maybe we should be consistent.

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1 MR. THAYAMBALLI: I agree.

2 THE COURT: I will add it after the words "in return."

3 Thank you.

4 MS. SHAPIRO: Your Honor, not to beat a dead horse,  
5 but at the end of page 59 we would object to the last sentence  
6 as, again, it's unnecessary to keep repeating ad nauseam so  
7 many times that circumstantial evidence is sufficient.

8 THE COURT: I understand. I will leave the language  
9 as is.

10 MR. McKAY: Your Honor, I hate to backtrack but  
11 there's one that we skipped for us, which was on page 57. The  
12 penultimate sentence on that page, "If Dean Skelos did not  
13 believe his conduct was wrongful or unlawful, he did not act  
14 corruptly," I'm not sure that's a precise statement of the law.

15 I think the way the Court phrased it at the last time  
16 and we proposed is a little better, which is, "To act corruptly  
17 means to act voluntarily and intentionally with improper motive  
18 or purpose to be influenced in connection with," and then we go  
19 on to cite the business or transaction language, which I  
20 understand you may wish to change the official act at this  
21 point.

22 And the next sentence -- sorry, I should be clear.

23 MR. GAGE: What page, I'm sorry?

24 THE COURT: 57.

25 MR. McKAY: What we object to is the last two

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1 sentences there, "if Dean Skelos did not believe," and that  
2 additionally, "corrupt intent involves a violation of some duty  
3 owed to the public or the government in general." And what I  
4 would say is undoubtedly here the corrupt intent that is at  
5 issue is the quid pro quo.

6 And so rather than defining it as some unspecified  
7 duty, we should be specific, which is to say what the Court  
8 said last time, essentially, it means to act with an improper  
9 motive to be influenced in connection with a business or  
10 transaction of the State of New York, or, if you will, in  
11 connection with official action. But the point is that's what  
12 the corrupt intent is, it's not some nebulous violation of  
13 duty.

14 MR. THAYAMBALLI: Your Honor, while it's true that the  
15 violation of duty here would be the quid pro quo, that is not  
16 what the corruptly element is limited to. And as I think we  
17 explained in our objections, the definition that the government  
18 just cited, "voluntarily and intentionally acting with an  
19 intent to be influenced," is not sufficient. There is already  
20 an intent to be influenced element in Section 666. Corruptly  
21 is separate. And what corruptly does is an important an idea  
22 of consciousness of wrongdoing. I think that if the Court were  
23 to redefine "corruptly" in the manner the government explained  
24 it would be confusing and would conflate those two elements and  
25 understate the consciousness of wrongdoing.

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1 THE COURT: What if I were to take out the last two  
2 sentences on page 57?

3 MR. THAYAMBALLI: Your Honor, unless the government  
4 wants to go first, the last sentence is an accurate statement  
5 of the law from *United States v. Rooney*, which is a Second  
6 Circuit case. The sentence before that is also accurate. If  
7 Dean Skelos didn't believe his conduct was wrongful or  
8 unlawful, then he didn't have consciousness of wrongdoing, and  
9 therefore, did not act corruptly.

10 MR. McKAY: Your Honor, our concern with that sentence  
11 is not only that we think it's misleading, and I can explain  
12 why, but it is also redundant of what your Honor has in the  
13 first sentence, which is to act corruptly he must have been  
14 conscious of his own wrongdoing. That's exactly the concern  
15 that my colleague was just describing, so I think cutting it  
16 off after two sentences, as you proposed, and deleting the last  
17 two would be clear.

18 MR. THAYAMBALLI: Your Honor, I believe in other parts  
19 of the charge the Court has expanded a bit on elements in order  
20 to avoid confusion for the jury. I think consciousness of  
21 wrongdoing is something that is important, it is a separate  
22 element, it requires more than one sentence to explain.

23 THE COURT: Often brevity leads to one paying more  
24 attention to the main point. I think here the main point is  
25 the consciousness of your own wrongdoing, and I think the

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1 statement is stronger when we leave out the elaboration on it.  
2 So my proposal is to delete the last two sentences on page 57.  
3 I think the government says it can live with that.

4 MR. McKAY: We can, your Honor, thank you.

5 THE COURT: I note the defense objection.

6 MS. SHAPIRO: Thank you.

7 MR. McKAY: We have one more thing on 58, which was  
8 just "as opportunities arise" is missing in one place, it's the  
9 third paragraph, "In other words, the government must prove --"

10 THE COURT: Right.

11 MR. McKAY: "As opportunities arise" should be  
12 included after "in exchange for payment" before the comma.

13 MS. SHAPIRO: We object, your Honor.

14 THE COURT: I understand. I'm going to add it.

15 MR. THAYAMBALLI: Your Honor, I apologize, if we could  
16 go back to something the government raised. I think we didn't  
17 have a chance to respond or didn't think to respond at the  
18 time.

19 On page 56, in the third paragraph, the government  
20 wanted to change the word "bribing" to "influencing," so if the  
21 payment was made for the purpose of influencing Dean Skelos.  
22 And we object to that and we deliberately changed the language,  
23 because although the statute uses the term "influence," clearly  
24 more is required for a violation of 666. There has to be a  
25 quid pro quo. We think that bribing is the better way to



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1 describe it, and the Court does define it later, and as a  
2 result the jury won't be confused.

3 If, on the other hand, the Court says "a payment is  
4 made with the purpose of influencing Dean Skelos," there are  
5 many things that are intended to influence that are not -- that  
6 would not satisfy the statute; campaign contributions, for  
7 example. So as a result, we think that language is  
8 prejudicial.

9 MR. McKAY: We're just quoting the statute, your  
10 Honor. The problem with "bribing" is that it relates to the  
11 entire crime as opposed to this element, which is just talking  
12 about the influence on Dean Skelos.

13 THE COURT: All right. I'll keep "influencing" rather  
14 than "bribing," given it's the language of the statute. I  
15 think we're to page 58, maybe 59, maybe even 60?

16 MR. McKAY: On 60, your Honor, the bone fide language  
17 appears again. I don't know if the defense still wants it  
18 there or not, but if they want to leave it, we just ask that  
19 you cross-reference your earlier definition.

20 MS. SHAPIRO: I think we could strike it here, your  
21 Honor.

22 THE COURT: Strike the last --

23 MS. SHAPIRO: The last paragraph.

24 THE COURT: -- paragraph.

25 Does the government disagree?

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1 MR. McKAY: No, that's fine, your Honor.

2 THE COURT: We'll strike the last paragraph on page  
3 60.

4 MR. McKAY: We have two things on 61, if there's  
5 nothing more on 60. And these are just to make the same  
6 changes that were made earlier when we defined these elements  
7 with respect to bribery. So in the third element we had added  
8 "for himself or a third party" at the end of that element.

9 THE COURT: Yes, I will add that.

10 MR. McKAY: And for the sixth element, we had struck  
11 that "the official act involved," and we replaced it with that  
12 language which I believe was "the value of the government  
13 matter to which the payment related was at least 5,000."

14 THE COURT: So the government's proposal is to strike  
15 from the last line the words "official act" and replace them  
16 with "value of the government matter to which the payment  
17 related was."

18 MR. McKAY: Yes, your Honor.

19 MS. SHAPIRO: That's fine with us, your Honor.

20 THE COURT: Okay.

21 MR. THAYAMBALLI: Your Honor, our next point is on  
22 page 63.

23 MR. McKAY: If we could go to 62 first.

24 THE COURT: Yes.

25 MR. McKAY: The last sentence there, again payments

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1 made in the usual course of business, I think it's an  
2 abbreviated version of the bone fide language that we had seen  
3 earlier. I guess I would inquire if the defense still wants it  
4 there. If they do, we ask that you use the same language you  
5 used earlier that includes the phrase bone fide and the  
6 definition rather than this shorthand.

7 MS. SHAPIRO: We could just delete that sentence, your  
8 Honor.

9 THE COURT: Okay. I'm deleting the last sentence on  
10 page 62.

11 MR. THAYAMBALLI: On page 63, in the fourth paragraph,  
12 the Court is contrasting bribes and gratuities, and the second  
13 sentence says, "To convict on a bribery theory you must find  
14 that Dean Skelos had the intent to be influenced in connection  
15 with some business or transaction of the State of New York."

16 We would again object to that sentence. I think the  
17 second and third paragraphs very clearly explain the difference  
18 between a bribe and a gratuity. And the fact that a gratuity  
19 does not require quid pro quo, this comparison in the fourth  
20 paragraph is therefore unnecessary, and we would submit  
21 prejudicial again because simply referring to influence as the  
22 standard for bribery is incomplete and therefore waters down  
23 the quid pro quo standard.

24 MR. McKAY: Your Honor, we do think it's useful to  
25 explain the distinction between influence and reward. It's not

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1 necessarily that intuitive of a concept.

2 THE COURT: I agree. I will keep it.

3 I see a typo on 64, line 2. I think we should strike  
4 the word "that."

5 MR. McKAY: Your Honor, I was going to propose  
6 striking the whole paragraph.

7 THE COURT: Even better.

8 MR. McKAY: This is the same issue we dealt with as to  
9 the other counts as well.

10 THE COURT: Yes. I think we should take it out.

11 MS. SHAPIRO: Which paragraph?

12 THE COURT: All of page 64.

13 MS. SHAPIRO: We object.

14 THE COURT: I'll nonetheless delete it.

15 MR. BROD: Your Honor, on page 67 at the bottom, this  
16 is on the aiding and abetting --

17 THE COURT: Yes.

18 MR. BROD: -- the way in which -- I just think the  
19 last sentence is surplus. It repeats the third sentence of  
20 that paragraph, essentially, and thus is something of a non  
21 sequitur. The previous sentence talks about finding the  
22 defendants not guilty.

23 THE COURT: You're beginning to mumble.

24 MR. BROD: Sorry, Judge, I think the last sentence of  
25 the page could be struck without losing anything.

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1 THE COURT: Because it's redundant of what?

2 MR. BROD: It's redundant of the third sentence of  
3 that paragraph, which if you decide beyond a reasonable doubt  
4 that . . . then the defendant Adam Skelos may be found guilty,  
5 then the next sentence is if you do not find beyond a  
6 reasonable doubt then he's not guilty, and then the final  
7 sentence of the paragraph is thus, so it's redundant but also  
8 it doesn't follow from the previous sentence, so it's confusing  
9 and it's inconsistent with the way in which this if you do  
10 find, if you don't find --

11 THE COURT: I need to have a moment to read the page.

12 (Pause)

13 THE COURT: Well, I think it certainly doesn't belong  
14 where it is. I'm going to -- I'm reviewing whether the concept  
15 is --

16 MR. McKAY: Your Honor, the reason we think it is  
17 appropriate -- and I note this wasn't objected to in the  
18 original proposal, but the reason this is appropriate is  
19 because it is explaining what is not otherwise an intuitive  
20 concept to the jury, which is that someone who is not a public  
21 official can be found guilty if they caused a public official  
22 to commit a corruption crime. So it may be that there's a  
23 better place for it than where it currently is, but we think it  
24 does need to be included to crystallize that concept for the  
25 jury.

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1 MR. BROD: Your Honor, I note that that point is made  
2 I think throughout the section, but even right up front in the  
3 first paragraph on page 65. "Because Adam Skelos is not  
4 himself a public official or an agent of New York State  
5 government, you may find him guilty of Counts Three through  
6 Eight only if the government proves beyond a reasonable doubt  
7 that he aided and abetted or willfully caused the commission of  
8 the crimes by Dean Skelos."

9 And it may be that that crops up later in the section,  
10 I'm not sure, but I do think that point is made here. So to  
11 finish on it I do think is redundant and excessive because it  
12 leaves the jury with an unbalanced picture, having been told if  
13 you find beyond a reasonable doubt, if you don't, but then  
14 again if you do. It's just too much, Judge.

15 THE COURT: Well, I think where it would fit, maybe a  
16 more abbreviated form, would be on page 67 at the end of the  
17 third paragraph, which now reads, "As I mentioned, Adam Skelos  
18 can also be held liable for willfully causing another person to  
19 commit a federal crime, that is, although Adam Skelos is not  
20 himself a public official," et cetera, "he may be convicted if  
21 he willfully caused."

22 MR. BROD: It's okay with us, Judge.

23 MR. McKAY: Us, too, your Honor.

24 THE COURT: So I'm moving the last sentence on page 67  
25 to becoming the last sentence of the third paragraph on page

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1 67.

2 MR. McKAY: Your Honor, going back a page to 66, the  
3 fourth paragraph, the last sentence of that says -- ends with,  
4 "were at the direction of Dean Skelos and were either bribes or  
5 gratuities, as I have defined those terms," but that's actually  
6 also referencing the extortion counts. So we ask that either  
7 be changed to reflect something like "were bribes, gratuities  
8 or extortion payments, as I have defined those terms," or maybe  
9 just "corrupt payments."

10 THE COURT: Yes. So the proposal is to add "or  
11 corrupt payments" after the word "gratuities," "bribes,  
12 gratuities or corrupt payments."

13 MR. McKAY: That's fine, your Honor.

14 THE COURT: Okay.

15 MS. SHAPIRO: Your Honor, the next thing we had was on  
16 page 68, the dual intent, no defense instruction. Your Honor,  
17 we think this is unbalanced and unnecessary and is confusing  
18 because it conflates intent with motive, which of course the  
19 latter is not an element. And if the point is that you can't  
20 accept bribes just to help out a family member, we proposed  
21 what we believe is more neutral language that makes the same  
22 point, and it would be for every count in the indictment if you  
23 find that the government has proved the required elements  
24 beyond a reasonable doubt, it does not matter what motivated  
25 the defendant to engage in the charged conduct.

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1 THE COURT: I don't think that explains very well to  
2 the jury what a dual intent is.

3 MS. SHAPIRO: Well, I think the problem is that, as  
4 phrased, this is confusing and conflates motive, which is  
5 really not an issue, and intent. So I don't know if there's  
6 another way to do it, but we think that -- we think our  
7 language does a better job of it.

8 THE COURT: You're distinguishing between intent and  
9 motive, is that right?

10 MS. SHAPIRO: Correct, your Honor. I just think this  
11 is confusing, and I think if the point is simply that -- that's  
12 right, we're making that distinction, so --

13 THE COURT: If they act with a dual motive, in other  
14 words, if the word intent is the problem, we can keep the  
15 language by changing intent to roughly motive. But that's not  
16 what you want, I take it.

17 I understand why you're objecting, but I think that  
18 it's helpful to the jury.

19 MS. SHAPIRO: Could I have a moment, your Honor?

20 THE COURT: Yes.

21 (Pause)

22 MS. SHAPIRO: Your Honor, I think the sentence that we  
23 have the most trouble with is the one that starts with  
24 "However," which I think is sort of confusing. What if we just  
25 deleted that sentence?



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1 THE COURT: If we deleted and then begin the next  
2 sentence with but something like that, "However, a defendant  
3 may be found," how does the government feel about deleting?

4 MR. McKAY: I would say, your Honor, maybe if the  
5 concern is the terms "motive" and "intent," although I think in  
6 this case they're co-extensive, we could change it to "However,  
7 it is no defense that the defendant had --"

8 THE COURT: Both proper --

9 MR. McKAY: -- "both proper and improper intent."

10 MS. SHAPIRO: I think there's some repetition there,  
11 because the Court has eliminated the other redundancies that  
12 were favorable to the defendant, that doesn't really add  
13 anything because the very next sentence says that a defendant  
14 may be found to have the requisite corrupt intent or intent to  
15 defraud if he possesses a dual intent, and so it doesn't really  
16 add anything that is not already captured by the second  
17 sentence -- I mean the third sentence.

18 THE COURT: I do think that it would be equally  
19 helpful to the jury to strike, "It is no defense that the  
20 defendant was motivated by both proper and improper motives."  
21 That's basically what we're saying in the next sentence.

22 MR. McKAY: Your Honor, that's fine. We just keep the  
23 "However," though?

24 THE COURT: Yes.

25 MR. McKAY: Okay. Your Honor, on 69 there's a stray

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1 reference to kickbacks. I think we cut that elsewhere.

2 THE COURT: Actually we left it in in an earlier page.  
3 We should take it out. 44, middle of the page, first word,  
4 "kickbacks." So we would end the sentence with the word  
5 "bribes" and strike "or kickbacks."

6 MS. SHAPIRO: I have two other points on this page.

7 The first is in the nature of preservation, because I  
8 know this was briefed, but we do preserve our objection and our  
9 argument that a public official cannot be convicted of honest  
10 services fraud or Section 666 bribery if he would have taken  
11 the same official act regardless of the payment, as we argued  
12 in our most recent objections, docket 385 at 100 to 101, note  
13 12, our initial objections, 349-2 at 104 to 105, note 77, our  
14 June 17 letter, docket number 364, and July 1st letter, docket  
15 number 378 at 4 to 6.

16 I understand the Court has thought about that, but I  
17 do have an issue with the language on a related point, which  
18 is -- and I believe the government agrees with us or has  
19 indicated in its past briefing that it did agree that if the  
20 public official was already predisposed to taking the act  
21 sought by the payor that that is relevant to his intent.

22 And so I make two suggestions in this regard. Number  
23 one, about five lines down there's a sentence here that says,  
24 "But you may consider the lawfulness of the official act when  
25 assessing the intent of the defendant." And respectfully, the

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1 request actually is that that sentence be taken out in lieu of  
2 another sentence I'm going to propose. And the point here is  
3 that defense is not arguing that the lawfulness of the official  
4 act, that is, that was lawful for him to cast these votes or  
5 propose legislation or whatever is what reflects on his good  
6 faith intent, but rather it's that this is legislation that he  
7 supported for years, his vote was never in doubt. That's the  
8 relevant point.

9 So in lieu of that sentence, we propose --

10 THE COURT: Sorry, in lieu of the one beginning "But?"

11 MS. SHAPIRO: "But you may consider the lawfulness."

12 In lieu of that, we would propose the following,  
13 "However, if the public official was already predisposed to  
14 taking the official acts sought by the payor, that is a fact  
15 you may consider in determining whether the payor had any  
16 motive to influence the public official, and whether the public  
17 official understood that the payor expected to receive official  
18 actions in return."

19 This language, by the way, appears on page 101 of the  
20 red line that we filed on July 3rd.

21 MR. McKAY: Your Honor, I think we're okay with the  
22 first part of that sentence, which is that if a public official  
23 is predisposed to taking the official act sought, you may  
24 consider that in determining -- as relevant when assessing the  
25 intent of the defendant. We think that gets the point across

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1 and is sufficient.

2 I think the second part is a little bit more arguable.

3 THE COURT: I think it makes the sentence very hard to  
4 understand.

5 MS. SHAPIRO: Sorry, I'm not entirely clear on exactly  
6 what they're proposing.

7 THE COURT: I can read what is on the screen, if you  
8 want, if the public official was predisposed to take the acts  
9 sought -- the official acts sought, you may consider that in  
10 determining -- when assessing the intent of the defendant.

11 Do I have that right?

12 MR. McKAY: Yes. You might say when assessing the  
13 intent of the public official.

14 THE COURT: Yes.

15 MR. McKAY: I think we would say instead of "if the  
16 public official was predisposed," we would say "if you find  
17 that the public official was predisposed."

18 THE COURT: Yes, was predisposed.

19 MS. SHAPIRO: Your Honor, I do think it's also  
20 relevant to the state of mind of the alleged victim in the  
21 sense that part of that inquiry is whether the alleged victim  
22 had a reasonable fear. And obviously we're going to argue that  
23 these various alleged victims didn't have any such reasonable  
24 fear because they knew that Dean Skelos had for years supported  
25 the legislation they were seeking. And I think it's relevant

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1 to both.

2 MR. McKAY: Our concern on that was twofold. First of  
3 all, I'm not sure that's exactly what they proposed. What they  
4 proposed is still focused on --

5 MS. SHAPIRO: Focused on both.

6 MR. McKAY: Let me say this instruction is about the  
7 public official's intent and with respect to lawfulness or  
8 whether or not he would have taken the same official action.  
9 So now to focus this on the payor's intent we think is not  
10 properly placed here. We agree that the defense can make that  
11 argument in their closing, but when we're talking about the  
12 public official's intent, I'm not sure that makes sense.

13 MR. THAYAMBALLI: Your Honor, if I may address that,  
14 this instruction, as the government has proposed it, is not  
15 about -- is not just about the intent of the defendant. I mean  
16 the point seems to be that you can't argue that you would have  
17 done the same thing anyway, and that's not a defense with  
18 respect to intent. We are trying to explain that it is  
19 relevant for a few purposes, the intent of the payor and the  
20 intent of the public official, and I think stripping away of  
21 the intent of payor is misleading, and it's important to  
22 instruct the jury that that is a relevant consideration for  
23 that element.

24 MS. SHAPIRO: Your Honor, I noticed this, I'm not  
25 quite sure how to fix it, but the title of this instruction is

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1 also I think not quite right because it says unlawfulness of  
2 official acts, no defense, which is not really what is relevant  
3 in terms of the arguments made in this case.

4 THE COURT: Right. Predisposition to take, something  
5 along those lines.

6 MR. McKAY: Your Honor, we propose it to be  
7 desirability of official acts, because that's the thrust of  
8 this instruction.

9 THE COURT: I think part of what is confusing here is  
10 that the desirability of unlawful act in the first sentence and  
11 then the last has to do with something different, which is  
12 striking "and should have." "And should have" is consistent,  
13 but the fact that he would have taken the same action is  
14 separate from desirable.

15 Perhaps they should be separate instructions.

16 MS. SHAPIRO: I think, just so it's clear, our  
17 argument is sort of the desirability or beneficial aspect of  
18 this legislation is only -- the reason that's relevant to our  
19 defense is that we're arguing that it's because of that that he  
20 supported it for decades, and the fact that he supported it for  
21 decades is what, in our view, is a reason the jury should  
22 conclude that he wasn't selling his vote and that these  
23 victims -- alleged victims couldn't have reasonably believed  
24 that, for example, he would withhold support for the extender  
25 legislation if Mr. Bonomo didn't do anything to help Adam.

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Charge Conference

1           So they're sort of related, but I think the ultimate  
2 point is that the longstanding support and the fact that there  
3 would have been such a huge problem if the legislation hadn't  
4 been enacted all go to what was in both Dean Skelos' mind and  
5 what would have been reasonable for the alleged victims to  
6 think. So they're sort of related. I think they both need to  
7 be in here.

8           THE COURT: How would you phrase this? In other  
9 words, I don't recall exactly what your language would be.

10          MS. SHAPIRO: Could we have a moment?

11          THE COURT: Certainly.

12          (Pause)

13          MR. McKAY: Your Honor, perhaps I can propose a  
14 compromise, which the sentence the defendant wanted to strike,  
15 the "but you may consider," we can say "but if you find the  
16 public official was predisposed to taking the official action  
17 sought, you may consider that in determining whether there was  
18 a quid pro quo," and that reflects both sides.

19          THE COURT: I think that's right.

20          MS. SHAPIRO: Your Honor, I think we want to get  
21 across in here and use the word "intent." I don't think that's  
22 sufficiently specific. It makes the instruction more  
23 unbalanced, especially because the title says -- I'm not sure  
24 how the title --

25          THE COURT: We'll have to rephrase the title.

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Charge Conference

1 MS. SHAPIRO: But it says it's no defense, and the  
2 point is, if argued a certain way, according to this  
3 instruction, it's no defense, but it is relevant to the defense  
4 as to lack of a corrupt intent, lack of a quid pro quo. So I  
5 don't think that works.

6 THE COURT: Okay. How about something like, "However,  
7 that can be taken into account," et cetera.

8 MS. SHAPIRO: When assessing the intent of the  
9 defendant?

10 THE COURT: Yes.

11 MS. SHAPIRO: And the payor as well. I think if you  
12 added "and the payor," that would probably be sufficient, as  
13 long as we changed the title.

14 THE COURT: So would it read, "However, that may be  
15 taken into account when assessing the intent of the defendant  
16 and the payors," defendants plural and payors plural.

17 MS. SHAPIRO: I think that's a good start. We would  
18 suggest adding at the end of that, in entering into the quid  
19 pro quo -- into a quid pro quo.

20 THE COURT: Does the government have a problem with  
21 that?

22 MR. MCKAY: No, that's fine.

23 THE COURT: I think it's fine.

24 MR. THAYAMBALLI: Your Honor, the way that I'm reading  
25 it on the screen, I think it says you can consider this in



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1 assessing the intent of the defendant and the payors in  
2 entering the quid pro quo, I think it should be conditional,  
3 whether the intent of -- in assessing whether the defendant and  
4 the payor intended to enter a quid pro quo.

5 THE COURT: All right. However, that may be taken  
6 into account when assessing whether a defendant or a payor  
7 intended to enter into a quid pro quo.

8 (Continued on next page)

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1 MS. SHAPIRO: That's fine with us, your Honor.

2 MR. McKAY: Us too, your Honor.

3 THE COURT: Okay, good.

4 MS. SHAPIRO: I guess we still have to fix the title.  
5 I'm not sure.

6 THE COURT: Yes. Something along the lines of History  
7 of Official Acts.

8 MS. SHAPIRO: Yes. Maybe it should say Relevance of  
9 History of Official Acts instead of saying No Defense.

10 THE COURT: Yes.

11 MR. McKAY: Your Honor, perhaps just you can strike  
12 "No Defense" but just say Desirability of Official Acts.

13 MR. BROD: Your Honor, I think the issue is that it  
14 goes beyond desirability.

15 MS. SHAPIRO: I think that's right, your Honor. As I  
16 indicated earlier, it is much more than that. In fact, in a  
17 way it is more about the history.

18 THE COURT: Yes. We can say Relevance of History and  
19 Desirability of Official Acts.

20 MR. McKAY: Well, look. I mean, I think we are  
21 agreeing over minutia now but the point is it is no defense, it  
22 is no legal defense. It is also relevant. So, we would object  
23 if we struck no defense but then added in relevance.

24 MS. SHAPIRO: But, your Honor, no defense is in the --  
25 the point that they're making about no defense is in the very

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1 first sentence. It says it is not a defense to extortion. We  
2 don't need it in the title as well because then the title  
3 doesn't capture the relevance point.

4 MR. BROD: It may be in the title that "or," rather  
5 than "and," is more appropriate. Relevance of History or  
6 Desirability.

7 THE COURT: I think we are trying to pack too much  
8 into it.

9 MS. SHAPIRO: Your Honor, this is a very important  
10 point for us.

11 THE COURT: I agree.

12 MS. SHAPIRO: Yes.

13 THE COURT: I want to get it right but it is getting  
14 too long to be useful.

15 MR. McKAY: I would just say it is a title, you might  
16 as well keep it neutral, just say Desirability of Official Acts  
17 and then they can read the --

18 THE COURT: That leaves out the history.

19 MS. SHAPIRO: Your Honor, if given a choice, we would  
20 rather have "history" in the title than "desirability" but they  
21 should both --

22 THE COURT: History or desirability of official acts,  
23 no defense.

24 MR. THAYAMBALLI: Your Honor, we would not like to  
25 keep a no defense language, it is relevant to factual events.

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1 THE COURT: Why don't we leave it Relevance of History  
2 or Desirability of Official Acts.

3 MR. McKAY: Again, we have now -- that's the part we  
4 objected to. I realize this is getting --

5 MR. BROD: We think that would be a great title,  
6 Judge, plus it is completely neutral.

7 MR. McKAY: Well, no, it is not neutral because it  
8 suggests their relevance but leaves out the fact that it is not  
9 a legal defense.

10 MR. BROD: The first sentence is, It is no defense so.

11 MS. SHAPIRO: I mean, the concern is that obviously  
12 the Court is going to read the whole instruction but the jury,  
13 I assume, is going to get a copy of these instructions so if  
14 they go back to it and see that the title says "no defense," it  
15 is a little bit misleading because it doesn't -- the title  
16 doesn't incorporate the other piece of it. That's the concern.

17 THE COURT: That's right.

18 All right, can we leave the title at relevance of  
19 history.

20 MR. McKAY: How about History of Official Acts?

21 THE COURT: I think the defense said they liked that.

22 MS. SHAPIRO: If that's all it is, that's fine.

23 THE COURT: Okay. History of Official Acts will be  
24 the title.

25 MR. McKAY: Your Honor, the next point, the defense

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1 had asked that we take out the venue instruction. Obviously  
2 venue is stipulated to. We are fine with taking out the  
3 instruction since it has the different standard of proof but I  
4 think in light of the fact that it is stipulated to, it would  
5 be appropriate to just have a one-sentence instruction that  
6 says venue is appropriate in the Southern District of New York.

7 THE COURT: Just for my education, why would that be  
8 needed?

9 MR. McKAY: Well, you never know.

10 THE COURT: Because they have to find it.

11 MR. McKAY: They have to find it. You never know who  
12 on the jury has heard about venue before and they say --

13 THE COURT: Yes.

14 MR. McKAY: -- was there venue? There is no dispute  
15 about it so it is just one sentence, just to check the box.

16 THE COURT: Okay.

17 MS. SHAPIRO: I was going to say but not only is there  
18 no dispute, I think we have effectively waived any venue  
19 defense if there was one so I don't think it is anything the  
20 jury needs to find, but.

21 MR. McKAY: I think the jury does have to find venue  
22 and if have you a juror who is thinking about venue and thinks,  
23 gosh, this happened out on Long Island...

24 THE COURT: Think it is harmless to keep it.

25 MS. SHAPIRO: That's fine.

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1 THE COURT: Ms. Shapiro, what is your next one?

2 MR. McKAY: I guess on the informal immunity  
3 instruction we had proposed a different version of it that was  
4 adapted from Sand. It is clear the Court rejected that in  
5 favor of one more similar to or perhaps identical to the one in  
6 the original trial but, so we are not going to belabor that  
7 point but I do think that this instruction is more unbalanced  
8 than the Sand. For example, the Sand instruction specifically  
9 suggests saying such testimony should be received by you with  
10 suspicion and you may give it such weight, if any, you believe  
11 it deserves. That concept, I think, is not adequately covered  
12 here, so we would just request that that language be added.

13 THE COURT: I have never given a charge with the word  
14 "suspicion." I haven't even considered it because no one has  
15 proposed it. So, what is here is "with great care and viewed  
16 with particular caution."

17 Would the government like to respond?

18 MR. McKAY: No, your Honor. We think that sentence  
19 you just quoted adequately covers the concept without having  
20 the loaded term of "suspicion."

21 THE COURT: I think "suspicion" is too loaded so I  
22 note your objection.

23 MS. SHAPIRO: Thank you, your Honor.

24 So, next thing we have is on page 75. So, I guess the  
25 main point here, which we briefed in both our original requests

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1 to charge and objections and the more recent ones filed on  
2 Tuesday, is that we think this is unnecessary and that this  
3 type of instruction is generally given in 371 conspiracy cases  
4 where there is an overt act requirement. And it is important  
5 that the jurors understand that with respect to the overt act,  
6 the particular defendant doesn't have to have committed any  
7 overt act but we think it is irrelevant here and it is  
8 unnecessary and confusing and we don't think the Court should  
9 give a Pinkerton instruction which is basically what this  
10 amounts to.

11 So, we object to it.

12 THE COURT: Would the government object to omitting  
13 it?

14 MR. McKAY: We would, your Honor.

15 This is a fairly standard instruction in conspiracy  
16 cases which this is one. It is certainly not limited to  
17 proving an overt act which is the 371 conspiracy but we do have  
18 two conspiracy counts, the defendants are alleged to be  
19 co-conspirators and all sorts of defendants' statements came in  
20 at this trial. They, of course, were admissible both against  
21 the person speaking them but also against their co-defendant as  
22 co-conspirator statements and so we think this is actually  
23 extremely important and helpful and inaccurate.

24 MS. SHAPIRO: Your Honor, obviously the admissibility  
25 of the co-conspirators' statements is, you know, no longer in

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1 dispute, the jury has heard them, they can consider them, we  
2 are not disputing that. The problem with this instruction is  
3 that when you have conspiracies like the two that are charged  
4 in this case, neither of which requires an overt act, the only  
5 elements are the agreement and the defendant's intent and it is  
6 hard to see how the statements of another co-conspirator that  
7 the defendant doesn't even know about could shed any light on  
8 the defendant's intent to join the unlawful agreement and the  
9 reason, as I mentioned earlier, the reason this language is  
10 standard in most conspiracy cases is because the vast majority  
11 of conspiracy cases tried in this district involve a 371 count  
12 which does have an overt act element and that's what this is  
13 relevant to. It can't possibly be relevant to the defendant's  
14 own state of mind if it is some statement that a co-conspirator  
15 supposedly made that he wasn't even aware of. It doesn't make  
16 sense and it is confusing, it is unnecessary in this context.

17 MR. MCKAY: Your Honor, that's actually not the law.

18 In a conspiracy, the reasonably foreseeable acts and  
19 statements of any member of the conspiracy committed in  
20 furtherance are attributable. That's important in this case  
21 because there are all sorts of statements made by one  
22 co-conspirator that the defendant are claiming another  
23 co-conspirator didn't make or wasn't responsible for. But, if  
24 those are the reasonably foreseeable statements of a  
25 co-conspirator, they do come in against him so the hostage



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1 e-mail is one of but very many examples. And so, this is  
2 necessary to explain that concept to the jury.

3 THE COURT: I will leave it in.

4 MS. SHAPIRO: Well, we object, your Honor.

5 THE COURT: Over objection.

6 MS. SHAPIRO: Thank you.

7 MR. McKAY: Your Honor, the prior page 74 you noted  
8 that preparation of witnesses is if applicable.

9 THE COURT: Yes.

10 MR. McKAY: We think that should be included.

11 THE COURT: Yes.

12 MR. McKAY: I don't think there was objection.

13 THE COURT: Right. I will include page 74,  
14 preparation of witnesses.

15 MR. THAYAMBALLI: Your Honor, if I could amplify the  
16 record on that, acts of statements of co-conspirators' point?  
17 I know have you ruled on that.

18 The government has said that there are certain pieces  
19 of evidence in this case that show that statements were made  
20 that were reasonably foreseeable to one of the other  
21 defendants. I don't see how that has anything to do with the  
22 element of the conspiracy which is that the defendant entered  
23 into an agreement or -- whether there was an agreement, whether  
24 the defendant entered into an agreement, the foreseeability  
25 point presupposes the existence of a conspiracy. So, I don't

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1 see how you can prove that a defendant intentionally entered  
2 into a knowing agreement to violate the law by looking at some  
3 foreseeable statements that someone else made.

4 THE COURT: Thank you.

5 MR. McKAY: Judge, the next two, 77 and 78.

6 THE COURT: Yes.

7 MR. McKAY: False exculpatory and similar acts, we  
8 will defer to the defense on this. We are happy to leave these  
9 in or to take them out. We will defer to defense.

10 MS. SHAPIRO: Your Honor, I think they should be taken  
11 out.

12 THE COURT: Okay. I am striking page 77, false  
13 exculpatory statements and page 78, similar acts.

14 MR. McKAY: Your Honor, the next thing is we had asked  
15 for an instruction on particular investigative techniques.  
16 That did not appear in the Court's draft, we would ask that the  
17 Court include it in the draft.

18 THE COURT: It was taken out because I couldn't  
19 remember how that had come up.

20 MR. McKAY: It came up in a lot of different areas.

21 So, the most memorable example I have is when there  
22 was a lot of cross-examination about how the FBI chose to have  
23 Bjornulf White meet Adam Skelos at a bar rather than a coffee  
24 shop.

25 THE COURT: Yes.

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1 MR. McKAY: The very clear import of that was improper  
2 conduct by the FBI.

3 THE COURT: Yes.

4 MR. McKAY: So, that was but one example and so we do  
5 think that it is appropriate to have this instruction.

6 THE COURT: I think you are right.

7 Any objection?

8 MR. BROD: Judge, because it is not in the hard copy  
9 document I don't have it in front of me. I would like another  
10 opportunity to go back and take a look at it. So, if we could  
11 circle back to this?

12 THE COURT: Yes.

13 MS. SHAPIRO: Your Honor, we just have one other  
14 thing, item on page 85 and the persons not on trial. We had  
15 proposed some additional language that was taken from Sand and  
16 we think it is particularly appropriate in this case because  
17 there were so many witnesses with non-prosses. It is from the  
18 Sand instruction 3-4.

19 The sentence that begins: In addition, you may not  
20 speculate as to the reasons why other persons are not  
21 defendants in this trial. We would propose adding the  
22 following: Comma, except that as explained above, you may  
23 consider whether a witness' testimony should be believed  
24 because he has been granted a non-prosecution agreement.

25 MR. McKAY: Your Honor, we think that's a bit of a

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1 nonsequitur. This is talking about persons not on trial, not  
2 about witness credibility. Your Honor has already given a  
3 lengthy instruction on informal immunity and the way that they  
4 should assess those witnesses' credibilities, so we think this  
5 is already covered and a nonsequitur here.

6 THE COURT: I agree.

7 MS. SHAPIRO: Thank you, your Honor.

8 THE COURT: Was that your last point?

9 MS. SHAPIRO: It was, yes. Believe it or not.

10 MR. McKAY: I was hoping the defense could tell us  
11 whether we needed page 88 or 89.

12 MS. SHAPIRO: I will let Mr. -- do you want me to?

13 MR GAGE: Go ahead.

14 MS. SHAPIRO: So, and we are not being cute, we are  
15 being instructed by our client. Dean Skelos still hasn't  
16 decided and he won't make a final decision until he hears the  
17 other defense witnesses but he may testify, just to be clear,  
18 so.

19 THE COURT: Thank you, and Adam.

20 MR. BROD: Judge, we intend to have one more  
21 conversation with our client at the conclusion of this  
22 conference but, you know, I am not going to put anything on the  
23 record at this point.

24 MR. McKAY: Your Honor, so I guess the only thing we  
25 would say in response to that -- we understand the defense's

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1 position -- is that with respect to both defendants,  
2 particularly Adam Skelos, there are unbriefed issues as to the  
3 scope of cross-examination if he testifies. As to Dean Skelos,  
4 there are some briefed issues that we would need to resolve.  
5 Obviously we would need time to prepare. So, we just ask two  
6 things. One, if the defendants aren't prepared to give us a  
7 decision until the close of the other witnesses, just that we  
8 have assurance that we will have the time we need to, A,  
9 prepare for those cross-examinations; and B, file any motions  
10 that may arise related to their testimony.

11 THE COURT: I will do that.

12 MS. SHAPIRO: Your Honor, I think it is unlikely that  
13 we would, if anyone testifies, any of the defendants, that we  
14 would get to the cross on Friday anyway, right?

15 THE COURT: It is a non-point.

16 MS. SHAPIRO: I thought there was only one issue as to  
17 Dean Skelos which was fully briefed already which has to do  
18 with the law firm.

19 THE COURT: Well, I'll go with what the government  
20 wants, in other words if they make a showing that they need  
21 time I will give them time.

22 MR. BROD: I mean, there is one motion which  
23 Mr. Zolkind and McKay have told us they may intend to file with  
24 respect to Adam Skelos. I told Mr. Zolkind kind earlier that  
25 we are going to tell him at some point after this conference

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1 this evening, after we have had the discussion with our client,  
2 whether he intends to testify or not and that should resolve  
3 that issue.

4 MR. McKAY: That's fine, your Honor.

5 And just with respect to the scheduling of this, if  
6 the defense witnesses finish Friday morning and Dean Skelos is  
7 prepared to testify Friday afternoon, we would just have two  
8 issues. One is, first of all, I think they're right, we  
9 probably wouldn't get to cross-examination until Monday so that  
10 may moot one of the issues, but the other is that we still have  
11 no defense exhibits for any witness, let alone Dean Skelos. If  
12 there are a substantial number of exhibits that may be coming  
13 in through him, we will need to get notice of those so we can  
14 object, if necessary.

15 THE COURT: I will give you the time you need to do  
16 that.

17 MR. McKAY: Thank you, your Honor.

18 THE COURT: Shall we go back to conscious avoidance?

19 MR. McKAY: I had one last thing.

20 THE COURT: Yes.

21 MR. McKAY: Which is page 86, there was an instruction  
22 on outside income.

23 THE COURT: Right.

24 MR. McKAY: With respect to a very, very brief snippet  
25 in that one recording I don't think there was any mention of

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1 Dean Skelos' outside income. Obviously, if he testifies that  
2 may change but, as of now, I'm not sure if this is necessary or  
3 not so I would ask the defense's position.

4 THE COURT: Right.

5 MS. SHAPIRO: I think that's fine. I think it is  
6 unnecessary now. Obviously if he testifies and the Court rules  
7 that he can be crossed on that, then it is a different story.

8 THE COURT: Okay. So, at this point I'm striking  
9 outside income, striking outside income on page 86.

10 Do you have a preference as to where I insert venue?  
11 Toward the end, I take it

12 MR. McKAY: Anywhere in the end there is fine.

13 THE COURT: So, on conscious avoidance I have some  
14 questions.

15 MR. McKAY: Your Honor?

16 THE COURT: Yes.

17 MR. McKAY: Your Honor, if I may, in what is the  
18 seemingly unlikely event that we begin our closing tomorrow, I  
19 should probably go start working on it. Mr. Diskant is going  
20 to handle conscious avoidance. If it is all right, I am going  
21 to take my leave.

22 THE COURT: I wouldn't force anyone to close tomorrow  
23 after the day we have had today so if you don't want -- if you  
24 want to have a shorter day and not close tomorrow, that's all  
25 right.

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1 MR. McKAY: I appreciate that, your Honor. I think  
2 perhaps we will see what the timing is like. If the defense  
3 rests at 11:00, I wouldn't want the jury to only have been here  
4 for an hour and a half. I could get a chunk of the closing  
5 done. But, let's see how far I get tonight.

6 THE COURT: Okay.

7 MR. McKAY: Thank you.

8 THE COURT: Good. We will take up conscious  
9 avoidance.

10 MR GAGE: Your Honor, if I may? I would also like to  
11 be excused.

12 THE COURT: Yes.

13 MR GAGE: Thank you.

14 THE COURT: Would those of you who are here be ready  
15 to deal with conscious avoidance or should we wait until we  
16 have the men who are leaving? I think I will begin with the  
17 government.

18 MR. DISKANT: We certainly are ready to proceed. It  
19 may be helpful to hear the Court's questions and we will do  
20 what we can.

21 THE COURT: Okay.

22 Does the government have an idea of where a jury could  
23 acquit Dean Skelos if the conscious avoidance charge were not  
24 given but would convict him if this they understood the concept  
25 of conscious avoidance?



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1 MR. DISKANT: Yes. I think that -- so, I think with  
2 respect to the PRI scheme, which is what we have talked about a  
3 lot, the defense argument has been all along that Anthony  
4 Bonomo was giving this job to Adam Skelos and was allowing Adam  
5 Skelos to continue to have the job out of some combination of  
6 his friendship with Dean and his personal fondness or sympathy  
7 for Adam Skelos. The government's response to that has been  
8 multi-faceted but, particularly, with respect to Anthony  
9 Bonomo's corrupt intent, that is, the bribe payor's, the  
10 extortion victim's intention, our opinion all along has been  
11 the strongest corroborative evidence of Anthony Bonomo's  
12 testimony has to do with the facts and the circumstances  
13 surrounding Adam Skelos employment -- the fact that he lashes  
14 out at his supervisor, the fact that he is not showing up, the  
15 fact that he never gets a license and doesn't seem to be taking  
16 the test all that seriously. Absent a conscious avoidance  
17 instruction, a juror could think, well, you know, Dean Skelos  
18 didn't ask a lot of questions and so therefore when he said  
19 work it out, he didn't have a whole lot of information,  
20 particularly given Ms. Shapiro's cross-examination of Al  
21 D'Amato which I think was intended to draw into question just  
22 how much information, how many details about the circumstances  
23 surrounding that employment were actually provided to Dean  
24 Skelos.

25 I think the same could be said of the other two

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1 schemes which is that there have been defense arguments about  
2 the circumstances as they come from the bribe payor's  
3 perspective or the extortion victim's perspective that Dean  
4 Skelos may not have been aware of. The response to that is the  
5 conscious avoidance instruction, is that if there is sufficient  
6 facts from which Dean Skelos was on notice that there is  
7 something wrong here and he failed to ask additional questions,  
8 the law doesn't allow him to insert that as a defense.

9 Now, let me be clear, I said it before and I want to  
10 reiterate it: The government has no intention of using  
11 conscious avoidance with respect to the defendant's intention.  
12 We agree that would be inappropriate. We have to prove, based  
13 on other evidence, that the defendant intended to be  
14 influenced, that the defendant intended to take official action  
15 in return for what PRI was doing. So, this is only from the  
16 bribe payer's perspective to complete the story.

17 THE COURT: I don't understand your last sentence.

18 MR. DISKANT: So, there obviously are two components  
19 to the quid pro quo. Right? And we have to show on the one  
20 hand what Dean Skelos' intent was. Extortion is, in some  
21 respects, a slightly easier example which is does Dean Skelos  
22 intend to be extracting a payment in return for some sort of a  
23 threat of official action. On that we carry the burden of  
24 proving direct, actual knowledge. We can't use --  
25 circumstantial evidence is obviously appropriate but we can't

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1 use the buried-his-head-in-the-sand conscious avoidance side of  
2 it.

3 With respect to the bribe payor's perspective and some  
4 of the arguments the defendants have been making about what  
5 Dean Skelos thought of the bribe payor's perspective, this is  
6 just an old friend, this is someone who has sympathy on my son.  
7 In connection with those arguments, in connection with that  
8 component of the scheme we are entitled, we believe, to a  
9 conscious avoidance instruction, that is, it is not a defense  
10 that Dean Skelos didn't ask more questions about why his son  
11 was continuing to have a no show job at PRI. He didn't find  
12 out more information about what it is his son was actually  
13 doing for the payments or the circumstances surrounding them.

14 MS. SHAPIRO: Your Honor, can I respond to that?

15 THE COURT: Yes.

16 MS. SHAPIRO: The problem with that is intent and  
17 knowledge are two different things and it is one of the  
18 problems. But, I would just also add that there has been  
19 evidence from both Anthony Bonomo and Senator D'Amato but  
20 particularly Anthony Bonomo that he actually told Dean Skelos  
21 that Adam Skelos was not showing up for work. And, Mr. D'Amato  
22 also testified that he said that to Dean Skelos, that he said  
23 he was being disruptive. I tried to call some of his  
24 credibility on those points into question but the point is  
25 there is evidence that he was actually told about this. We may

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1 dispute the credibility of that evidence but there is no  
2 evidence that, you know, he was sort of on notice of the high  
3 probability that Adam wasn't showing up but deliberately didn't  
4 ask further questions. But, I think more importantly, the  
5 point is did he know that the bribe payor, the alleged bribe  
6 payer here was only giving Adam, continuing to employ Adam  
7 because he thought he needed to do that in order to influence  
8 Dean Skelos.

9           So, I just think it's completely inapposite in this  
10 context and, again, the government has not cited a single  
11 public corruption case where this kind of an instruction was  
12 approved so it is just not appropriate here, it is going to be  
13 confusing, and I think Court's own confusion with some of the  
14 government's arguments here illustrates the point because if  
15 the Court and frankly at least myself on the defense table  
16 cannot fully understand what the government is saying, I  
17 respectfully submit it is inconceivable that the jury is going  
18 to understand how this applies in this case. It just muddies  
19 the water and they have got a very straightforward case here,  
20 your Honor. You know we are going to dispute it, obviously,  
21 but this is not -- this is just simply not appropriate here and  
22 it is going to be incredibly prejudicial and confusing.

23           MR. DISKANT: Can I propose something, your Honor?

24           The government doesn't intend, as Mr. McKay indicated,  
25 the government does not intend to get into this issue in its

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1 closing which Mr. McKay will be delivering. I am prepared to  
2 represent that I also will not get into this issue in my  
3 rebuttal so that the Court can effectively reserve on this  
4 issue and I think we should watch how the defendants argue to  
5 the jury. Because if they are making certain arguments about a  
6 lack of knowledge I think they do in fact invite this  
7 instruction because I think there is a factual predicate for  
8 it. I don't think it is as confusing as Ms. Shapiro is making  
9 it out to be. And if, by contrast, they choose not to make  
10 those arguments then we can withdraw our request for the  
11 instruction and that will be that.

12 THE COURT: That makes sense to me.

13 MR. KENNEY: I just want to add, your Honor, I was in  
14 a case where this was an issue and argued in the Second Circuit  
15 not too many years ago. I cannot fathom what knowledge the  
16 government is saying that would warrant argument about  
17 knowledge or that such an argument would be made. But, I am  
18 perfectly happy to accept the proposal of considering the at a  
19 later point.

20 THE COURT: I would like to -- yes.

21 MR. THAYAMBALLI: I would like to add one thing which  
22 is that the knowledge that the government is referring to is  
23 somewhat of a red herring because the instruction -- this is an  
24 instruction for conscious avoidance in a conspiracy context.  
25 It says that the defendants have to be consciously avoiding

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1 knowing what the objectives of the conspiracy are. I'm not  
2 sure how the facts of this case were frankly or conceptually  
3 defendants can consciously avoid knowing that they're part of a  
4 bribery scheme if they're public officials or if one of them is  
5 a public official. He would know whether he is accepting a  
6 bribe or not, or whether he has agreed to accept a bribe or  
7 not. That's the distinction.

8 MR. BROD: The point, since everybody is making their  
9 points, is just that. We cannot consciously avoid the fact  
10 that you are a party to an agreement, which is the essence of  
11 every single charge in this case. It is not possible.

12 THE COURT: I understand that point. I want to try to  
13 see if I can capture anything different here. Give me a  
14 moment. (pause)

15 Well, I think we can leave it at the compromise  
16 position.

17 MS. SHAPIRO: The compromise meaning the Court will  
18 reserve?

19 THE COURT: Yes.

20 MS. SHAPIRO: That's fine, your Honor. Obviously we  
21 don't object to that.

22 THE COURT: Okay. Anything else?

23 MR. BROD: I was just going to see, Judge, if I could  
24 take a look at this instruction on investigative techniques.

25 THE COURT: Sure. I think my law clerk might be able

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1 to help.

2 I think it is straight out of Sand. My law clerk has  
3 it, if you would like.

4 MR. BROD: Thank you very much.

5 (pause)

6 MR. BROD: Judge, we have no problem with an  
7 instruction being given on this point but we would object to  
8 the last two sentences of the instruction which, I believe, do  
9 not appear in Sand. These are the sentences about no  
10 particular techniques needing to be used. I think that just  
11 invites speculation and then the sentence about the government  
12 not being on trial. There has been no suggestion that the  
13 government is on trial and just emphasizes the position that  
14 the defendants are in. I don't think it is necessary, it  
15 doesn't add anything, and frankly, the entire instruction is  
16 simpler with just the first couple of sentences.

17 THE COURT: Well, a compromise might be to strike "the  
18 government is not on trial," and keep "law enforcement  
19 techniques are not your concern."

20 MR. DISKANT: Your Honor, I will note that Mr. Brod  
21 himself did a great deal to put the FBI on trial at this case  
22 to the point where the Court had to give an instruction at one  
23 point so I think, as drafted, it is not inappropriate.

24 THE COURT: Well, I --

25 MS. SHAPIRO: Your Honor, we are fine with the Court's

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1 suggestion.

2 THE COURT: I am going to go back and see why I do  
3 this all the time. I thought it was straight from Sand. I  
4 will reserve on that as well.

5 Have a good evening and thank you for being so  
6 prepared.

7 MS. SHAPIRO: Thank you, your Honor.

8 MR. DISKANT: Thank you, your Honor.

9 MR. BROD: Thank you, your Honor.

10 (Adjourned to Friday, July 8, 2018 at 9:00 a.m.)  
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2011-F through 2011-I,	
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